No. 16042

United States
Court of Appeals
for the Ninth Circuit

IRVING I. BASS, Trustee in Bankruptcy of the Estate of Zipco, Inc., a corporation, bankrupt,
Appellant,

vs.

AETNA FACTORS CO., FRUEHAUF TRAILER CO., and COM-AIR PRODUCTS, INC.,
Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California,
Central Division

FILED
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PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—9-2-58

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NAMES AND ADDRESSES OF ATTORNEYS

CRAIG, WELLER & LAUGHARN,
WILLIAM E. BARTLEY,
111 West 7th Street,
Los Angeles 14, California,

Attorneys for Appellant, Trustee.

QUITTNER, STUTMAN & TREISTER,
GEORGE M. TREISTER,
639 So. Spring Street,
Los Angeles 14, California,

Attorneys for Aetna Factors Co.

STANLEY A. PHIPPS,
458 So. Spring Street,
Los Angeles 14, California,

Attorney for Fruehauf Trailer Co.

ALEX D. FRED,
8692 Wilshire Boulevard,
Beverly Hills, California,

Attorney for Com-Air Products, Inc.

In The United States District Court for Southern District of California, Central Division

No. 71250-WM

In the Matter of

ZIPCO, INC., a California Corporation,

Debtor.

IN PROCEEDINGS FOR AN ARRANGEMENT

To the Honorable Judge of the District Court of the United States, for the Southern District of California, Central Division:

The petition of Zipco, Inc., a California Corporation, of the City of Los Angeles, County of Los Angeles, State of California, engaged in the business of operating a drill jig bushing manufacturing business, respectfully represents:

I.

Your petitioner has had its principal place of business at Los Angeles within the above judicial district for a longer period of the six months immediately preceding the filing of this petition than in any other judicial district.

II.

No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

III.

The debtor is a person who could become a bankrupt under Section 4 of the Bankruptcy Act, 11 U.S.C.A. Section 22, and is not a municipality, railroad, insurance or banking corporation, or a building and loan association.

IV.

That your petitioner is unable to pay its debts as they mature and proposes an arrangement for the payment of its unsecured creditors under Chapter XI, Section 322 of the Bankruptcy Act, 11 U.S.C. Section 722, which is contained in Exhibit A annexed hereto and made a part hereof.

V.

That your petitioner will file Schedule A within ten days from the date hereof as per Court Order.

VI.

That your petitioner will file Schedule B within ten days from the date hereof as per Court Order.

VII.

That the statement attached hereto, marked Exhibit "1", and verified by your petitioner's oath, contains a full and true statement of its executory contracts, as required by the provisions of said Act.

Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance

with the provisions of Chapter XI of the Act of Congress relating to bankruptcy.

Dated: April 4th, 1956.

ZIPCO, INC., a California Corporation,
By /s/ MILO M. TURNER,
President.
/s/ ROBERT H. SHUTAN,
Attorneys for Petitioner.

[Endorsed]: Filed April 5, 1956.

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND ORDER OF REFERENCE UNDER SECTION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on April 5, 1956, before the said Court the petition of Zipco, Inc., a corporation, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Joseph J. Rifkind, one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Zipco, Inc., shall attend before said referee on April 12, 1956, and at such times as said

referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable William C. Mathes, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on April 5, 1956.

JOHN A. CHILDRESS,
Clerk,
By /s/ REX LAWSON,
Deputy Clerk.

[Endorsed]: Filed April 5, 1956.

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Los Angeles, California, in said District, on the 11th day of May, 1956.

The petition of the debtor for an arrangement under Chapter XI of the Bankruptcy Act filed on the 5th day of April, 1956, having been withdrawn and said debtor having consented to being adjudged a bankrupt under the Act of Congress relating to bankruptcy, and there being no opposing interest;

It is adjudged that the said Zipco, Incorporated, is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed May 15, 1956.

[Title of District Court and Cause.]

ORDER APPROVING APPOINTMENT OF TRUSTEE

At Los Angeles, in said district, on the 31st day of May, 1956, Irving I. Bass, of Los Angeles, California, having been appointed trustee of the estate of the above named bankrupt by the creditors of said bankrupt, as provided in the Act of Congress relating to bankruptcy,

It Is Ordered that the appointment of said Irving I. Bass, as trustee be, and it hereby is, approved, and the amount of his bond is fixed at $5,000.00 dollars.

JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed May 31, 1956.

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE

To the Honorable Joseph J. Rifkind, Referee In Bankruptcy:

The verified petition of Irving I. Bass respectfully represents:

I.

That he is the duly elected, qualified and acting Trustee in the above-entitled bankruptcy proceeding.

II.

That among the assets of the within estate are various accounts receivable, including an account receivable against Fruehauf Trailer Co., a corporation, accounts receivable against Com-Aire, a corporation, and numerous others.

III.

That the books and records of your petitioner reflect that on May 3, 1956 your petitioner received the payment from Fruehauf Trailer Company made payable to your petitioner as Trustee, in the amount of $1,067.54, and that on May 9, 1956 your [3]* petitioner received a further payment from Fruehauf Trailer Co., made payable to Zipco, Inc., in the amount of $1,336.44.

IV.

That your petitioner is informed and believes and upon such information and belief alleges that on May 9, 1956 and subsequent to notice of the within bankruptcy proceedings, Fruehauf Trailer Co. paid over to the Los Angeles County Marshal's office the sum of $863.58 pursuant to an execution levied against the account of the bankrupt.

V.

That the books and records of the bankrupt reflect that the total amount which was due and owing the bankrupt from Fruehauf Trailer Co. was the sum of $4,086.60 of which your petitioner

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* Page numbers appearing at bottom of page of Original Transcript of Record.

has received the above mentioned payments totalling $2,403.98, leaving a balance of $1,682.62 owing this estate, including the aforementioned sum paid under execution.

VI.

That your petitioner is informed and believes and upon such information and belief alleges that Aetna Factors Company, a copartnership, claims that the accounts receivable of Fruehauf Trailer Co. and of Com-Aire and other accounts receivable of the bankrupt were duly and properly assigned to Aetna Factors Company prior to bankruptcy and that all sums due under the said accounts receivable and all sums heretofore collected by your petitioner on account of the said accounts receivable are property of the said Aetna Factors Company.

VII.

That your petitioner is informed and believes and upon such information and belief alleges that if there was any assignment of accounts receivable of the bankrupt to Aetna Factors Company that the same was without full or adequate consideration. [4]

VIII.

That your petitioner is informed and believes and upon such information and belief alleges that if there was any assignment of accounts receivable from the bankrupt to Aetna Factors Company that in the process of such assignment Section 3019 of the California Code of Civil Procedure was not complied with and that the said assignment should therefore be void as to your Trustee.

IX.

That your petitioner is informed and believes and upon such information and belief alleges that Aetna Factors Company has made demand for payment upon various of the accounts receivable of the bankrupt, and that Com-Aire and others have refused to pay your petitioner and have refused to pay Aetna Factors Company pending a determination by the Court as to who is the holder of title in and to the said accounts receivable.

Wherefore, your petitioner prays that the Court make and enter its Order to Show Cause, returnable on a day and at a time certain requiring Fruehauf Trailer Co. to appear and show cause, if any it may have, why the Court should not make and enter its Order that any assignment of accounts receivable to Aetna Factors Company is void as against your Trustee, and to further show cause why the Court should not make and enter its Order declaring and decreeing that Fruehauf Trailer Co. is indebted to this estate in the amount of $1,682.62, and to further show cause why the Court should not make and enter its Order declaring and decreeing that the above set forth payment under execution was void as to the Trustee in Bankruptcy.

Your petitioner further prays that the Court make and enter its Order to Show Cause, addressed to Aetna Factors Company, requiring that it appear on a day and at a time certain to show cause, if any it may have, why the Court should not [5]

make and enter its Order that it has no lien, claim or charge in or to accounts receivable of the bankrupt; and your petitioner further prays that the Court make and enter its Order to Show Cause addressed to Com-Aire Corporation requiring it to appear on a day and at a time certain and show cause, if any it may have, why the Court should not enter its Order that all sums payable by it by virtue of accounts receivable of the bankrupt are payable to the Trustee, and that the same are not payable to Aetna Factors Company.

Dated: February 1, 1957.

/s/ IRVING I. BASS,
Trustee.

CRAIG, WELLER & LAUGHARN,
/s/ By WILLIAM E. BARTLEY,
Attorneys for Trustee. [6]

Duly Verified. [7]

[Endorsed]: Filed February 5, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AGAINST FRUEHAUF TRAILER CO.

Upon reading the Petition of Irving I. Bass, Trustee herein, and good cause appearing,

Now, Therefore, upon motion of Craig, Weller & Laugharn, by William E. Bartley, attorneys for Trustee,

It Is Ordered that Fruehauf Trailer Co. and Aetna Factors Company appear before the undersigned Referee in Bankruptcy in his courtroom, 330 Federal Building, Temple and Spring Street, Los Angeles 12, California, on the 20th day of February, 1957 at 10:00 o'clock A.M., and then and there show cause, if any it may have, why the Court should not make and enter its Order that any assignment of accounts receivable to Aetna Factors Company is void as against the Trustee, and to further show cause why the Court should not make and enter its Order declaring and decreeing that Fruehauf Trailer Co. is indebted to this estate in the amount of $1,682.62, and for such other relief as may be proper in the premises. [8]

It Is Further Ordered that if the respondents desire to answer, plead or otherwise respond to said Petition, the same shall be in writing and served and filed at least two (2) days prior to the hearing hereof; and

It Is Further Ordered that service of this Order to Show Cause and the Petition upon which it is based shall be served upon Fruehauf Trailer Co. and Aetna Factors Company, at least five (5) days prior to the within hearing.

Dated: February 5, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy. [9]

[Endorsed]: Filed February 5, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AGAINST COM-AIRE CORPORATION

Upon reading the Petition of Irving I. Bass, Trustee herein, and good cause appearing,

Now, Therefore, upon motion of Craig, Weller & Laugharn, by William E. Bartley, attorneys for Trustee,

It Is Ordered that Com-Aire Corporation, Aetna Factors Company, appear before the undersigned Referee in Bankruptcy in his courtroom, 330 Federal Building, Temple and Spring Streets, Los Angeles 12, California, on the 20th day of February, 1957 at 10:00 o'clock A.M., and then and there show cause, if any it may have, why the Court should not enter its Order that all sums payable by it by virtue of accounts receivable of the bankrupt are payable to the Trustee, and that the same are not payable to Aetna Factors Company.

It Is Further Ordered that if the respondents desire to answer, plead or otherwise respond to said Petition, the same shall be in writing and served and filed at least two (2) days prior to [10] the hearing hereof; and

It Is Further Ordered that service of this Order to Show Cause and the Petition upon which it is based shall be served upon Com-Aire Corporation

and Aetna Factors Company at least five (5) days prior to the hearing hereof.

Dated: February 5, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy. [11]

[Endorsed]: Filed February 5, 1957.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AGAINST AETNA FACTORS CO.

Upon reading the Petition of Irving I. Bass, Trustee herein, and good cause appearing,

Now, Therefore, upon motion of Craig, Weller & Laugharn, by William E. Bartley, attorneys for Trustee,

It Is Ordered that Aetna Factors Company appear before the undersigned Referee in Bankruptcy in his courtroom, 330 Federal Building, Temple and Spring Street, Los Angeles 12, California, on the 20th day of February, 1957 at 10:00 o'clock A.M., and then and there show cause, if any it may have, why the Court should not make and enter its Order that said Aetna Factors Company has no lien, claim or charge in or to accounts receivable of the bankrupt; and

It Is Further Ordered that if the respondent desires to answer, plead or otherwise respond to said Petition, the same shall be in writing and served

and filed at least two (2) days prior to the hearing hereof; and [12]

It Is Further Ordered that service of this Order to Show Cause and the Petition upon which it is based shall be served upon Aetna Factors Co., at least five (5) days prior to the hearing hereof.

Dated: February 5, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy. [13]

[Endorsed]: Filed February 5, 1957.

[Title of District Court and Cause.]

MEMORANDUM OPINION RE ORDER TO SHOW CAUSE V. AETNA FACTORS, FRUEHAUF TRAILER COMPANY AND COM-AIR PRODUCTS, INCORPORATED

The trustee in bankruptcy by appropriate petition and order to show cause seeks to determine the validity of the assignments from the bankrupt to the Aetna Factors of certain accounts receivable due from Fruehauf Trailer Company and Com-Air Products, Incorporated, respectively. Notice of assignment in general terms not referring to the specific accounts involved, was executed and recorded within the time and manner required by Section 3017 et seq. of the Civil Code. Counsel for all parties have thoroughly prepared and ably presented their case.

The purchase order from Fruehauf Trailer Com-

pany to Zipco, Incorporated, provides in paragraph 5 "Assignment. The contract resulting from the acceptance of this order or any interest thereunder, shall not be assignable nor shall [21] any part of the work be sub-contracted by the vendor without prior written consent of the purchaser." The purchase order from Com-Air Products, Incorporated, to Zipco, Incorporated, provides in paragraph 15 "Assignment and Subcontracting. This order may not be assigned or subcontracted in whole or in any part nor may any assignment of any of the money due or to become due hereunder be made by the Vendor without the prior written consent of the buyer in each instance."

Fruehauf Trailer Company and Com-Air Products, Incorporated, have refused to recognize the assignment. Aetna Factors has filed suit against Fruehauf Trailer Company and Com-Air Products, Incorporated, to recover the accounts assigned. This court has enjoined Aetna Factors from continuing the further prosecution of such actions pending its determination of the validity of the assignments. Should this court determine the provision against assignment is valid, the money will be paid to the trustee in bankrupt. On the other hand, should this court determine the provision against assignment is invalid, the money will have to be paid to Aetna Factors or it may proceed with the pending action to compel payment pursuant to the assignment.

The respondents, Fruehauf Trailer Company, Com-Air Products Company and Aetna Factors, all made motions to [22] dismiss on the ground the

bankruptcy court did not have jurisdiction. It is obvious that neither Fruehauf Trailer Company nor Com-Air Products Company are disputing the right of the trustee in bankruptcy to the money and they are, therefore, not bona fide adverse claimants. The Motion to Dismiss of Fruehauf Trailer Company and Com-Air Products, Incorporated, on the ground that this court does not have jurisdiction, even if it had been timely and properly presented, is not well grounded. Since Aetna Factors does not have possession of the funds involved in the controversy, it also is obviously not a bona fide adverse claimant and its Motion to Dismiss on the ground that this court does not have jurisdiction, even if it had been timely and properly presented, is equally groundless. None of the respondents are bona fide adverse claimants and this court has constructive possession of and control over the money involved in the controversy. The Motions to Dismiss, as indicated at the hearing, are and each of them is denied, on the ground (1) that respondents are not bona fide adverse claimants and (2) the Objection to Jurisdiction and Motions to Dismiss were not timely made. Section 2 a (7) provides:

"* * * and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before [23] the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the

petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;"

Bankruptcy courts have jurisdiction over property within their actual or constructive possession. See Thompson v. Magnolia Petroleum Co., 309 U.S. 478; Goggin v. Bolsa Chica (9 Cir.) 125 F (2) 104; City of Long Beach v. Metcalf (9 Cir.) 103 F (2) 483. A person in possession of funds payable to bankrupt, who makes no adverse claim thereto, is subject to summary jurisdiction, even though others may be asserting claim to such funds adverse to the bankrupt estate. See in re Goldman (S.D. of N.Y.) 5 F. Supp. 973; Lahey v. Trachman (2 Cir.) 130 F (2) 748; In re Patrick (7 Cir.) 194 F (2) 750.

The validity of the provision in the purchase orders against assignment must be determined according to state law. Erie v. Tompkins, 304 U.S. 64; Laugharn v. Bank of America (9 Cir.) 88 F (2) 551, page 553; Stoner v. New York Life Insurance Company, 311 U.S. 464; Fidelity v. Field, 311 U.S. 169; West v. American Telephone and Telegraph Company, 311 U.S. 223. [24]

The rights and remedies of the trustee in bankruptcy in relation to such contract and the funds accruing and payable thereunder are fixed and determined by the Bankruptcy Act. The trustee in bankruptcy, in addition to the rights of the bankrupt, is under Section 70c of the Bankruptcy Act, vested as of the date of bankruptcy with all the rights, remedies and powers of a creditor then

holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists. Constance v. Harvey (Cir. 2) 215 F (2) 571 p 575 certiorari denied 348 U.S. 913; U.S. v. Eiland (Cir. 4) 223 F. (2) 118; Sampsell v. Straub (Cir. 9) 194 F (2) 228 p. 231; England v. Sanderson (Cir. 9) 236 F. (2) 641 p 643.

It will therefore be seen that although the validity of the contract must be determined by state law, that the rights of the trustee in bankruptcy are fixed and determined by the Bankruptcy Law. An agreement may therefore be valid between the parties but invalid as to creditors of the bankrupt. The bankrupt's estate is insolvent and claims are scheduled in the sum of $171,101.03 (including wages of $9,436.68 and taxes due United States, etc. of $16,029.26). In Arnold v. Phillips (5 Cir.) 117 F (2) 497, the court at pages 500-501 states as follows:

"The parties differ radically as to what system of [25] law controls. We are of opinion that in a bankruptcy case the ownership of property depends ordinarily on the State law, and so does the existence of a debt and the validity of the security for it. The enquiry begins in State law, but does not end there. Whether when bankruptcy supervenes a title acquired by one creditor is good against other creditors, and what are the relative rights and standing of creditors as against each other, and what the propriety of recognizing and enforcing secured debts under varying circumstances, are questions so related to the bankruptcy

power as to be regulable by Congress; they are of the essence of bankruptcy law. There necessarily arises also a body of judicial interpretation having the effect of law, which overrides the interpretation of the State courts on similar questions. The 'equity' administered in the bankruptcy courts may not be exactly that of the State courts."

The court has carefully read the numerous authorities cited by counsel for Aetna Factors. It appears that the case of Parkinson v. Caldwell, 126 Cal. App. (2) 548 is the only case helpful in deciding the question confronting us. The language in the Fruehauf Trailer Company contract is not as [26] clear and specific as the language in the Com-Air Products, Incorporated, contract. The language "or any interest thereunder" in the Fruehauf purchase order necessarily includes any money due or to become due and payable to the bankrupt under the contract or such language would be meaningless and surplusage.

The court in Parkinson v. Caldwell, supra, at p 552-553, states as follows:

"Where the language is clear an agreement not to assign a debt is effective. * * * The purpose of that limitation was clear, that he should not transfer the note before maturity to anyone, either by way of pledge or otherwise. * * * We are not impressed by the argument that this limitation on the power to assign or transfer the note is invalid. A contract right has its origin in the agreement of the parties and if the parties by their free agreement place a limitation on the right at the

very time of its creation no good reason occurs to us why they may not do so. * * * Finally, appellants argue that to permit the Uncle's estate to recover the proceeds of the note will result in its unjust enrichment, since the Uncle received the money, the repayment of which was attempted [27] to be secured by the pledge of this note. * * * It was established in the trial court that the estate of the Uncle is insolvent and that the Nephew has a claim against the Uncle's estate of approximately $10,000 for taxes which the Uncle failed to pay on the trust estate during his lifetime."

Since Fruehauf Trailer Company and Com-Air Products, Incorporated, refused to recognize the purported assignment from the bankrupt to Aetna Factors and had not at the date of bankruptcy paid the money accruing under the contract to Aetna Factors, could a creditor of the bankrupt have acquired an attachment or execution lien upon the money in the hands of Fruehauf Trailer Company and Com-Air Products, Inc. If an actual or hypothetical creditor under Section 70 c of the Bankruptcy Act could have acquired a lien upon the funds in possession of Fruehauf or Com-Air on the date of bankruptcy, then obviously the trustee in bankruptcy is entitled to the money. It is the conclusion of the court that a creditor of the bankrupt could have levied an attachment or execution upon the money in the hands of the vendors Fruehauf and Com-Air and, therefore, the funds in their possession are assets of the bankrupt estate.

The law is well established that any assets recovered by the trustee in bankruptcy based upon the rights of any prior [28] existing creditor or based upon the rights of any hypothetical credit existing on the date of bankruptcy are for the benefit of all creditors whose claims are filed and allowed in the bankruptcy proceedings and dividends must be declared and paid equally and ratably to all such unsecured creditors. Section 65a of the Bankruptcy Act, Moore v. Bay 285 U.S. 4; Sampsell v. Imperial Paper Co. 313 U.S. 215 p. 219; England v. Sanderson (9 Cir.) 236 F (2) 641 p 644.

The court concludes that the provision against assignment is valid and that the trustee in bankruptcy can assert the invalidity of such purported assignment. Zipco, Incorporated, will be given thirty (30) days from the date of the order within which to file a general claim for the amount of its claim (Sec. 57n of the Bankruptcy Act.) Counsel for the trustee will prepare findings of fact, conclusions of law and an appropriate order as provided by Rule 7.

Dated: May 10, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

cc: Messrs. Craig, Weller and Laugharn, Attorneys for Trustee. Messrs. Ronald B. Labowe and J. L. Ventress, Attorneys for Aetna Factors. Stanley A. Phipps, Esq., Attorney for

Fruehauf Trailer Company. Alex D. Fred, Esq., Attorney for Com-Air Products, Inc. [29]

[Endorsed]: Filed May 10, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION TO RECONSIDER

To the Trustee in Bankruptcy of the Above Entitled Estate and His Attorneys, Craig, Weller and Laugharn:

Notice Is Hereby Given that on the 31st day of July, 1957, at the hour of 10:00 o'clock A.M., in the courtroom of the Honorable Joseph J. Rifkind, Referee in Bankruptcy, room 330, Federal Building, Temple and Spring Streets, Los Angeles, California, Aetna Factors Company will move the Court to reconsider its decision announced in the Court's Memorandum Opinion of May 10, 1957. Said motion will be made on the ground that under the applicable law of the State of California no hypothetical creditor of the bankrupt could have acquired a lien upon the accounts receivable in controversy and that, accordingly, the Trustee in Bankruptcy cannot prevail under Section 70c of the Bankruptcy Act.

The "Memorandum of Points and Authorities in Support of Aetna Factors Co. on Order to Show Cause" heretofore filed in the above proceedings contains the authorities upon which reliance will be placed. The motion will also be based upon

the entire [30] record of the proceedings had herein.

Dated: June 19, 1957.

AETNA FACTORS COMPANY,
BY LABOWE AND VENTRESS
AND QUITTNER,
STUTMAN & TREISTER,
/s/ By GEORGE M. TREISTER,
Attorneys for Aetna Factors
Company. [31]

[Endorsed]: Filed June 20, 1957.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM OF OPINION—ORDER TO SHOW CAUSE v. AETNA FACTORS, ET AL, RE ASSIGNMENT OF ACCOUNTS RECEIVABLE

This matter involves the validity of a provision in a contract against assignment. The court previously ruled that the provision against assignment was valid. Because of the importance of the question involved, the application of newly associated counsel and of the several amicus curiae for permission to re-argue the matter was granted.

The respondents Fruehauf Trailer Company and Com-Air Products, Inc., herein also referred to as the obligors, are engaged in certain defense work. The subcontracts executed by respondents Fruehauf and Com-Air in favor of the bankrupt, contained provisions against assignment without their

consent. There are, of course, numerous reasons why the parties, especially under defense construction contracts, would want a provision against assignment, i.e., to prevent assignment to an irresponsible or incompetent person, to better control and supervise production and rejects, to control credits and offsets, to avoid multiplicity of payments and accounting incidental thereto, to avoid dealing with sundry persons instead [46] of a single person, etc.

The bankrupt assigned certain accounts receivable against the obligors to Aetna Factors, herein also referred to as the factor, without obtaining the consent of the obligors, as required by the contract. Subsequent to the purported assignment the bankrupt continued to send invoices to the obligors and received from the obligors checks in payment thereof until bankruptcy. These checks upon receipt were endorsed by the bankrupt and delivered to the factor. There were substantial balances unpaid under these contracts at the date of bankruptcy. Fruehauf and Com-Air refused to recognize the purported assignment or to pay the unpaid balances to the factor. The factor thereupon filed suit against the obligors in the state court and the factor has been enjoined from further prosecuting such actions pending the outcome of this proceeding.

Counsel for the factor earnestly argues that a provision against assignment in a contract is only for the benefit of the obligor and does not prevent an assignment by the obligee to a third person.

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Dated: June 19, 1957.

AETNA FACTORS COMPANY,
BY LABOWE AND VENTRESS
AND QUITTNER,
STUTMAN & TREISTER,
/s/ By GEORGE M. TREISTER,
Attorneys for Aetna Factors
Company. [31]

[Endorsed]: Filed June 20, 1957.

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Counsel for the factor earnestly argues that a provision against assignment in a contract is only for the benefit of the obligor and does not prevent an assignment by the obligee to a third person.

Counsel for the factor further argue that the assignment would have been valid against a judgment creditor of the bankrupt, and that such assignment is therefore valid against the trustee in bankruptcy, who stands in the same position under Section 70c of the Bankruptcy Act.

Counsel for the trustee and supporting amicus curiae argue with equal earnestness that the assignment is void because it is in violation of the provision in the contract against assignment. [47] They further argue that a judgment creditor could therefor have levied an execution upon the undisbursed funds in the possession of the obligor. They further argue that such assignment is therefor void as to the trustee in bankruptcy. This controversy is, of course, the very crux of the problem confronting us.

Section 70c of the Bankruptcy Act provides as follows:

"The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor

hen holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

The validity of the clause in the contracts against assignment must, of course, be determined according to state law. Erie v. Tompkins, 304 U.S. 64; Laugharn v. Bank of America (9 Cir.) 88 F (2) 51 page 553; In re Bastanchury (9 Cir.) 66 F (2) 53 page 656.

Respondents Aetna Factors and amicus curiae supporting its position, strongly rely on the case of Johnston v. Landucci (1942) [48] 21 Cal. (2) 3. The court on page 67 states the rule relating to assignment of contracts, as follows:

"Although there are no cases directly in point in California, the overwhelming weight of authority in other jurisdictions is to the effect that provisions against assignment, such as that contained in paragraph 17 of the Miller & Lux contract, are for the benefit of the vendor only, and in no way affect the validity of an assignment without consent as between the assignor and assignee. In other words, the interest of the assignor in the contract passes to the assignee, subject to the rights of the original seller. This is the rule set forth in the Restatement of the Law of Contracts. Section 176 reads as follows: 'A prohibition in a contract of the assignment of rights thereunder is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor by the assignment or the obligor from dis-

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charging his duty under the contract in any way permissible if there were no such prohibition.'

"The rule that such provisions are for the benefit of the seller and in no way affect the validity of an assignment as between the assignor and assignee is the rule adopted by the United States Supreme Court (Portuguese-American Bank v. Welles, 242 U.S. 7 (37 S. Ct. 3, 61 L.Ed. 116)), and is the rule approved by Williston in his work on Contracts (Williston on Contracts, Revised ed., vol. II, section 422). Although there are no cases [49] in California dealing directly with the assignment of choses in action in violation of a provision against assignment, there are several cases which hold that the prohibition in a lease against assignment is for the benefit of the lessor, and that an assignment without consent passes the interest of the assignor to the assignee. (Potts Drug Co. v. Benedict, 156 Cal. 322 (104 P. 432, 25 L.R.A.N.S. 609); Garcia v. Gunn, 119 Cal. 315 (51 P. 684); Randol v. Tatum, 98 Cal. 390 (33 P. 433); Kendis v. Cohn, 90 Cal. App. 41 (265 P. 844).)"

Were there no other or later decisions of the appellate courts of our state relating to the subject, the problem of this court would be quite simple.

We find, however, the much later decision of Parkinson v. Caldwell (1954) 126 Cal. App. (2) 548. This decision was not only decided twelve years later but specifically relates to assignment of choses in action whereas the reference to choses in action in the earlier case of Johnston v. Landucci, supra,

was dictum since the court in that case was dealing with the assignment of the vendee's interest under a land purchase contract.

Counsel for the trustee in bankruptcy and the amicus curiae supporting that position, on the other hand strongly rely on the case of Parkinson v. Caldwell, supra. The court in Parkinson v. Caldwell, supra, on pages 552-53, sets forth the rule of law as follows:

"Where the language is clear an agreement not to [50] assign a debt is effective. The precise question was elaborately discussed by the New York Court of Appeals in Allhusen v. Caristo Const. Co., 303 N.Y. 446 (103 N.E. 2d 891), and at page 893 (103 N.E. 2d) the court concluded:

'In the light of the foregoing, we think it is reasonably clear that, while the courts have striven to uphold freedom of assignability, they have not failed to recognize the concept of freedom to contract. In large measure they agree that, where appropriate language is used, assignments of money due under contracts may be prohibited.'

"So in 4 Corbin on Contracts, section 872, page 486 the author says:

'In any case, it is quite possible for the parties to show by apt words that rights created by the contract shall not be assignable. It is obvious that they mean exactly this and nothing else in case the contract is unilateral from the beginning. * * * So if A lends money to B, receiving from B a note

that expressly declares that it is not assignable, there is no doubt that they mean A's right to the money to be non-assignable.' * * *

"We are not impressed by the argument that this limitation on the power to assign or transfer the note is invalid. A contract right has its origin in the agreement of the parties and if the parties by their free agreement place a limitation on the right at the very time of its [51] creation no good reason occurs to us why they may not do so. The New York Court of Appeals in Allhusen v. Caristo Const. Co., supra, 103 N.E. 2d at page 893, said of a similar argument of invalidity: 'Such a holding is not violative of public policy. Professor Williston, in his treatise on Contracts, states (vol. 2, Section 422, p. 1214): "The question of the free alienation of property does not seem to be involved." The New York cases do not hold otherwise. * * * Plaintiff's claimed rights arise out of the very contract embodying the provision now sought to be invalidated. The right to moneys under the contracts is but a companion to other jural relations forming an aggregation of actual and potential interrelated rights and obligations. No sound reason appears why an assignee should remain unaffected by a provision in the very contract which gave life to the claim he asserts.'

"The California courts are in accord. In La Rue v. Groezinger, 84 Cal. 281, the court said at page 283 (24 P. 42, 18 Am.St.Rep. 179): 'if the contract itself provides in term that it is not trans-

ferable, it certainly cannot be transferred, although it otherwise might be so.' And the court said in Fairbanks v. Crump Irr. etc. Co., Inc., 108 Cal. App. 197, at page 205 (291 P. 629, 292 P. 529):

'The contract, as we saw, provided that "any and all moneys due" might be assigned with Fairbanks' "written consent." Appellant rightly says that no such language was needed to make payments due assignable. [52] But the language, having been used, must be given some effect, and it would have none unless it were tantamount to a provision that payments should not be assigned until due, and not then without Fairbanks' written consent. We are aware of no reason why the provision, as so construed should not be given effect.'

"We see no reason to follow the cases from other jurisdictions cited by appellants which seem to hold otherwise."

Counsel for the factor severely criticize the case of Parkinson v. Caldwell, supra, as being bad law and inconsistent with and contrary to the decision of the Supreme Court in Johnston v. Landucci, supra. It is significant to note in that connection, that in Parkinson v. Caldwell, supra, after a petition for rehearing was denied that thereafter a petition for hearing was denied by the Supreme Court of the State of California.

It is well established, that decisions of intermediate courts of appeal of the state, as well as the decisions of the courts of last resort of the

state, are equally binding upon the federal courts, in determining the law of the state when interpreting contracts between the parties. See Stoner v. N. Y. Life Insurance Co., 311 U.S. 464; Fidelity Union Trust Co. v. Field, 311 U.S. 169; West v. American Telephone & Telegraph Co. 311 U.S. 223. The court in the case of West v. American Telephone & Telegraph Co., supra, states the rule on page 237, as follows:

"Where an intermediate appellate state court rests its considered judgment upon the rule of law which it [53] announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. Six Companies of California v. Joint Highway District, ante, p. 180; Fidelity Union Trust Co. v. Field, ante, p. 169. Cf. Graham v. White-Phillips Co., 296 U.S. 27; Wichita Royalty Co. v. City National Bank, supra, 107; Russell v. Todd, supra. This is the more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court. True, some other court of appeals of Ohio may in some other case arrive at a different conclusion and the Supreme Court of Ohio, notwithstanding its refusal to review the state decision against the petitioner, may hold itself free to modify or reject the ruling thus announced. Vil-

lage of Brewster v. Hill, 128 Ohio St. 343, 353; 190 N.E. 766. Even though it is arguable that the Supreme Court of Ohio will at some later time modify the rule of the West case, whether that will ever happen remains a matter of conjecture. In the meantime the state law applicable to these parties and in this case has been authoritatively declared by the highest state court in which a decision could be had. If the present suit had been brought in the Cuyahoga county court no reason is advanced for supposing that the Cuyahoga court of appeals would depart from its previous ruling or that [54] the Supreme Court of the state would grant the review which it withheld before. We think that the law thus announced and applied is the law of the state applicable in the same case and to the same parties in the federal court and that the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation."

Assuming without conceding that the Supreme Court of the State of California may at some later date overrule Parkinson v. Caldwell, supra, it is at this time controlling upon this court. It necessarily follows that the purported assignments of the accounts receivable, in view of the provision in the contracts against assignment are void. Fruehauf Trailer Company and Com-Air, Inc., will therefor be ordered to pay any unpaid balances

in their possession to the trustee in bankruptcy. Aetna Factors will be permanently enjoined from prosecuting the actions instituted against Fruehauf Trailer and Com-Air, Inc., brought to recover the accounts receivable assigned to them by the bankrupt herein. Findings of fact, conclusions of law and order heretofore submitted will be signed and entered accordingly.

Dated: October 15, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy. [55]

cc: Messrs. Craig, Weller & Laugharn. Attention: Mr. William E. Bartley, Attorneys for trustee. Messrs. Quittner, Stutman & Treister and Messrs. Labowe and Ventress, Attention: Mr. George M. Treister, Attorneys for respondent Aetna Factors Co. Mr. Stanley A. Phipps, Attorney for Fruehauf Trailer Co. Mr. Alex D. Fred, Attorney for Com-Air Products, Inc. Messrs. Birnbaum & Hemmerling, Attorneys for Standard Factors Corporation Amicus Curiae. Messrs. Cosgrove, Cramer, Diether & Rindge, Attorneys for Citizens National Trust & Savings Bank of Los Angeles. Amicus Curiae. Mr. George A. Elstein, Attorney for Irving I. Bass, Trustee in Bankruptcy of G.M.C. Tool & Die Company, Bankrupt. [56]

[Endorsed]: Filed October 15, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE AETNA FACTORS COMPANY

The matter of the Trustee's Petition for Order to Show Cause addressed to Aetna Factors Company, Fruehauf Trailer Co. and Com-Air Products, Inc. having come on regularly for hearing before the undersigned Referee in Bankruptcy on the 20th day of February, 1957 and the matter having been continued to the 6th day of March, 1957, the Trustee appearing in person and by and through his counsel, Craig, Weller & Laugharn, William E. Bartley of counsel, Aetna Factors Company appearing by and through their counsel Ventress and Labowe, Com-Air Products, Inc. appearing by and through their counsel, Alex D. Fred, and Fruehauf Trailer Co. appearing by and through their counsel Stanley A. Phipps, and motions to dismiss based on lack of summary jurisdiction having been made by all of the respondents, and evidence both oral and documentary having been offered and received into evidence, and objections to proposed Findings of Fact, Conclusions of Law and Order re Aetna Factors Company having been duly filed with the Court by Ventress and Labowe and Quittner, Stutman & Treister, by [57] George M. Treister, attorneys for Aetna Factors Company, and a motion to reconsider having been duly filed with the Court on June 19, 1957 and various briefs and memoranda of Points and Authori-

ties and briefs of Amicus Curiae having been submitted, and the motion to reconsider having been duly argued before the Court on the 16th day of July, 1957, July 31, 1957 and Aug. 30, 1957, and the Court being fully advised in the premises does hereby make the following Findings of Fact, Conclusions of Law and Order based thereon:

Findings of Fact

I.

That prior to bankruptcy the bankrupt corporation and Fruehauf Trailer Co. entered into several contracts in writing identical in form whereby the bankrupt was to manufacture and supply various bushings to the said Fruehauf Trailer Co. and the Fruehauf Trailer Co. was to pay for the said bushings when invoiced.

II.

That on the 28th day of October, 1955 the bankrupt entered into contracts in writing to manufacture and furnish to Com-Air Products, Inc. various bushings and the said Com-Air Products, Inc., agreed to pay the bankrupt corporation for the said bushings when invoiced.

III.

That the aforesaid contracts and agreements between Fruehauf Trailer Co. and the bankrupt in paragraph 5 thereof all contained the following language: "Assignment. The contract resulting from the acceptance of this order or any interest thereunder, shall not be assignable nor shall any

part of the work be sub-contracted by the vendor without prior written consent of the purchaser."

IV.

That the aforesaid contracts and agreements by and between the bankrupt and Com-Air Products, Inc., all provide in paragraph 15 "Assignment and Subcontracting. This Order may not be assigned or subcontracted in whole or in any part nor may any assignment of any of the money due or to become due hereunder be made by the Vendor without prior written consent of the buyer in each instance."

V.

That the bankrupt made an assignment of accounts receivable, including the accounts arising by virtue of the above set forth contracts with Com-Air Products, Inc. and Fruehauf Trailer Co. to Aetna Factors Company.

VI.

That notice of assignment in general terms, not referring to the specific amounts involved, was executed and recorded within the time and manner required by Section 3017 et seq. of the California Civil Code.

VII.

That prior to the institution of the within proceedings Aetna Factors Company made demand on Fruehauf Trailer Co. and Com-Air Products, Inc. that they and each of them pay over the assigned accounts to Aetna Factors Company.

VIII.

That despite the demand of Aetna Factors Company, Fruehauf Trailer Co. paid the sum of $2,403.98 over to the Trustee, subsequent to bankruptcy, said sum representing what Fruehauf Trailer Co. alleged to be the balance due on accounts which arose by virtue of the above-mentioned contracts and which were assigned to Aetna Factors Company, in addition to the sum of $863.58 paid to the Trustee by the Marshal of the Municipal Court of the County of Los Angeles received by him pursuant to a garnishment in an action against the bankrupt.

IX.

That Com-Air Products, Inc. now holds the sum of [59] $5,496.36 which it alleges to be the sum now due and owing on accounts which arose by virtue of the above-mentioned contract on accounts which were assigned to Aetna Factors Company, and Com-Air Products, Inc. refuses to pay the same to the Trustee or to Aetna Factors Company unless and until the Court determines it is indebted.

X.

That a dispute exists between Fruehauf Trailer Co. and Com-Air Products, Inc. and Aetna Factors Company respecting the amounts owed by Fruehauf Trailer Co. and Com-Air Products, Inc.

XI.

That Aetna Factors Company has heretofore caused to be filed certain law suits in the Superior

Court of the State of California, in and for the County of Los Angeles, seeking to recover from Fruehauf Trailer Co. and from Com-Air Products, Inc. all amounts which became due under the aforesaid contracts, plus interest from the dates that they became due.

XII.

That Fruehauf Trailer Co. and Com-Air Products, Inc. each have actively asserted, and by and through their counsel, and as parties to this proceeding claim that the provisions set forth in Findings of Fact No. III and IV above render the assignments to Aetna Factors Company unenforceable as to them.

XIII.

That Aetna Factors Company, Com-Air Products, Inc. and the Fruehauf Trailer Co. did not file written answers contesting the jurisdiction of the Court within the time allowed in the Order to Show Cause which brought on these proceedings.

XIV.

That at the hearings herein the said Aetna Factors Company, Com-Air Products, Inc. and Fruehauf Trailer Co. made oral motions to dismiss for want of summary jurisdiction. [60]

XV.

That Aetna Factors Company did not have possession of the funds in question at the time of the filing of the Trustee's Petition and still does not have possession of the said funds.

Conclusions of Law

I.

That Fruehauf Trailer Co. does not dispute the right of the Trustee to the funds in the Trustee's possession and is therefore not a bona fide adverse claimant to the said funds.

II.

That Com-Air Products, Inc. does not dispute the right of the Trustee to receive payment under the above-mentioned contracts and agreements between the bankrupt and Com-Air Products, Inc. and is therefore not a bona fide adverse claimant.

III.

That Aetna Factors Company does not have possession of the funds in question and is not a bona fide adverse claimant thereto

IV.

That this Court has constructive possession of and control over the money and/or claims involved in the controversies arising in this action.

V.

That the various objections to jurisdiction and motions to dismiss made by Aetna Factors Company, Fruehauf Trailer Co. and Com-Air Products, Inc. were not timely taken and under Section 2-a(7) of the Bankruptcy Act this Court has summary jurisdiction over all matters herein contained.

VI.

That under California State law the above set forth clauses in the contracts between Com-Air Products, Inc. and [61] the bankrupt and Fruehauf Trailer Co. and the bankrupt are enforceable and the Assignment to Aetna Factors Company would be void as to them.

VII.

That under California State law a creditor of the bankrupt could have levied a valid attachment or execution upon the funds owing from Com-Air Products, Inc. and Fruehauf Trailer Co. despite the prior Assignment to Aetna Factors Company and prevail over Aetna Factors Company.

VIII.

That under Section 70-c of the Bankruptcy Act the Trustee is vested with all rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists.

IX.

That the funds in the hands of the Trustee and the funds owing from Com-Air Products, Inc. are assets of the within bankruptcy estate, free and clear of the Assignment to Aetna Factors Company.

Order

It Is Hereby Ordered that the objections to the jurisdiction of this Court and motions to dismiss based thereon, made by Aetna Factors Company,

Fruehauf Trailer Co., and Com-Air Products, Inc. are hereby overruled and dismissed; and

It Is Further Ordered that the aforementioned Assignment of accounts receivable made by and between the bankrupt corporation and Aetna Factors Company, a corporation, is void as against the Trustee herein; and [62]

It Is Further Ordered that all sums heretofore collected by the Trustee from Fruehauf Trailer Co. by and under the above-described contracts are assets of the within bankruptcy estate, free and clear of any lien, claim or charge of Aetna Factors Company other than as a general creditor herein when, as and if the said Aetna Factors Company files a proper claim herein; and

It Is Further Ordered that Com-Air Products, Inc. is hereby ordered and directed to pay over to the Trustee the sum of $5,496.36; and

It Is Further Ordered that Aetna Factors Company has no claim as against Fruehauf Trailer Co. or Com-Air Products, Inc. by and under the aforementioned Assignment of accounts receivable; and

It Is Further Ordered that Aetna Factors Company is permanently enjoined and restrained from proceeding with, or taking action in, the above-described Superior Court Actions; and

It Is Further Ordered that Aetna Factors Company is restrained and enjoined from in any manner, other than the filing of a claim in the within proceedings as provided in Section 57n of the Bankruptcy Act, from taking any action whatever in any manner whatever against the Fruehauf

Trailer Co., Com-Air Products, Inc., or the Trustee herein on any matters relating to the contracts or assignments herein referred to.

Dated: December 23, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed December 23, 1957. [63]

[Title of District Court and Cause.]

PETITION OF AETNA FACTORS COMPANY FOR REVIEW OF ORDER OF REFEREE IN BANKRUPTCY DATED DECEMBER 23, 1957

To the Honorable Joseph J. Rifkind, Referee in Bankruptcy:

The petition of Aetna Factors Company respectfully represents:

I.

Your Petitioner is aggrieved by the order of the Honorable Joseph J. Rifkind, Referee in Bankruptcy, dated December 23, 1957, determining that the Trustee in Bankruptcy had rights superior to Aetna Factors Company with respect to the accounts receivable owing by Fruehauf Trailer Company and Com-Air Products, Inc.

II.

The Referee erred in said order in the following particulars:

A. Regardless of the enforceability of the stipulation against assignment by the obligors of the accounts receivable, the Referee erred in holding that the assignment of accounts was void so as to make the assignment invalid as between the bankrupt and its assignee, Aetna Factors Company.

B. The assignment of the accounts being valid as between the bankrupt and Aetna Factors Company, the Referee erred in holding [64] the assignment to Aetna Factors Company invalid under Section 70c of the Bankruptcy Act as against the bankrupt's Trustee in Bankruptcy.

C. The Referee erred in holding that a creditor of the bankrupt could have, on the date of the bankruptcy, levied upon the Com-Air and Fruehauf accounts receivable theretofore assigned to Aetna Factors Company, and could have thereby obtained lien rights thereto superior to the title of Aetna Factors Company.

D. The Referee erred in holding that the provision against assignment in the Fruehauf contract prohibited an assignment of monies becoming due under the contract.

E. The Referee erred in determining the amounts of money owed upon the said accounts receivable by Fruehauf and Com-Air.

Wherefore, your Petitioner prays that said order of December 23, 1957, be reviewed by a Judge in accordance with the provisions of the Bankruptcy Act, and that upon the said review, an order be entered reversing the order of the Referee and de-

termining that Aetna Factors Company is entitled to the accounts receivable involved in this controversy.

Dated this 30th day of December, 1957.

AETNA FACTORS COMPANY,
By QUITTNER, STUTMAN & TREISTER,

/s/ By GEORGE M. TREISTER,
Attorneys for Aetna Factors Company. [65]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 2, 1958.

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW FROM REFEREE'S ORDER DATED DECEMBER 23, 1957

To: Hon. William C. Mathes, United States District Judge:

The undersigned Joseph J. Rifkind, a Referee in Bankruptcy of the above entitled court, does hereby certify as follows:

Statement of Case

The Trustee in bankruptcy filed a petition herein to determine the validity of the assignment of certain accounts receivable to Aetna Factors Company. The Court made an order on December 23, 1957,

holding the assignments invalid and the respondent Aetna Factors Company alone feeling aggrieved, has filed a petition for review of said order.

Summary of Evidence

The respondents Fruehauf Trailer Company and Com-Air Products, Inc. are engaged in certain defense work. These respondents awarded sub-contracts to the bankrupt which contained provisions expressly prohibiting assignment thereof without their consent. The bankrupt, despite such prohibition, assigned certain accounts receivable to the Aetna Factors Company without obtaining the consent of such respondents. Subsequent to the purported assignment, the bankrupt continued to send invoices in the usual manner and received checks in payment thereof which it in turn endorsed and [67] delivered to the factor. The court is satisfied that the factor knew of the provision in the contracts against assignment and adopted and used this practice to circumvent the prohibition.

There were substantial balances unpaid under these sub-contracts at the inception of bankruptcy. Fruehauf Trailer Company and Com-Air Products, Inc. refused to recognize the purported assignments or to pay the unpaid balances due under such sub-contracts awarded to the bankrupt. The factor thereupon filed suit in the State Court, and this bankruptcy court has enjoined the factors from further prosecution thereof pending the final determination of this proceeding.

Order of Referee in Bankruptcy

The findings of fact and conclusions of law are incorporated in and are made a part of the Order of December 23, 1957, from which the review has been taken.

Questions Presented on Review

The Petition for Review of Aetna Factors Company asserts that the referee erred as follows:

"A. Regardless of the enforceability of the stipulation against assignment by the obligors of the accounts receivable, the Referee erred in holding that the assignment of accounts was void so as to make the assignment invalid as between the bankrupt and its assignee, Aetna Factors Company.

"B. The assignment of the accounts being valid as between the bankrupt and Aetna Factors Company, the Referee erred in holding the assignment to Aetna Factors Company invalid under Section 70c of the Bankruptcy Act as against the bankrupt's Trustee in Bankruptcy. [68]

"C. The Referee erred in holding that a creditor of the bankrupt could have, on the date of bankruptcy, levied upon the Com-Air and Fruehauf accounts receivable theretofore assigned to Aetna Factors Company, and could have thereby obtained lien rights thereto superior to the title of Aetna Factors Company.

"D. The Referee erred in holding that the provision against assignment in the Fruehauf contract

prohibited an assignment of monies becoming due under the contract.

"E. The Referee erred in determining the amounts of money owed upon the said accounts receivable by Fruehauf and Com-Air."

Documents Transmitted With Certificate

The following documents are transmitted herewith, to wit:

1. Petition of Trustee in Bankruptcy for Order to Show Cause filed February 5, 1957.

2. Order to Show Cause against Fruehauf Trailer Company and Aetna Factors Company issued February 5, 1957.

3. Order to Show Cause v. Com-Air Products, Inc. and Aetna Factors Company issued February 5, 1957.

4. Order to Show Cause v. Aetna Factors Company issued February 5, 1957.

5. Memorandum of Points and Authorities of Aetna Factors Company filed March 11, 1957.

6. Memorandum Opinion dated May 10, 1957.

7. Notice of Motion to Reconsider filed June 20, 1957.

8. Amicus Curiae Brief on behalf of Aetna [69] Factors filed by Birnbaum & Hemmerling on July 31, 1957.

9. Supplementary Memorandum of Aetna Factors filed July 31, 1957.

10. Amicus Curiae Brief on behalf of Aetna

Factors filed by Cosgrove, Cramer, Diether & Rindge on August 5, 1957.

11. Supplementary Amicus Curiae Brief on behalf of Aetna Factors filed by Birnbaum & Hemmerling on August 15, 1957.

12. Trustee's Memorandum of Points and Authorities filed August 29, 1957.

13. Supplemental Memorandum Opinion filed October 15, 1957.

14. Findings of Fact, Conclusions of Law and Order dated December 23, 1957.

15. Petition for Review of Aetna Factors Company filed January 2, 1958.

16. Trustee's Exhibits Nos. 1 and 2.

17. Petitioner's Exhibits A through K.

18. Transcript of hearing on July 31, 1957.

19. Notice of Filing Certificate on Review dated January 24, 1958.

Dated: January 24, 1958.

Respectfully transmitted,

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

cc: Messrs. Craig, Weller & Laugharn, Attorneys for Trustee. Messrs. Quittner, Stutman & Treister and Messrs. Labowe and Ventress, Attorneys for Aetna Factors Company. Mr. Arthur W. Schmutz, Attorney for Century Engineers, Inc., and Century Electronics and Manufacturing Corporation. [70]

[Endorsed]: Filed January 24, 1958.

United States District Court, Southern District of California, Central Division

In Bankruptcy No. 71250-WM

In the Matter of
ZIPCO, INCORPORATED, a California corporation, Bankrupt.

ORDER ON REVIEW OF REFEREE'S ORDER OF DECEMBER 23, 1957

Upon the petition for review filed January 2, 1958 by Aetna Factors Company; upon the certificate of Referee Joseph J. Rifkind filed January 24, 1958; and upon the proceedings had before the Referee as appear from his certificate; and it appearing to the Court that:

(1) the "Summary of Evidence" set forth in the Referee's Certificate on Review states: "The respondents Fruehauf Trailer Company and Com-Air Products, Inc. are engaged in certain defense work. These respondents awarded sub-contracts to the bankrupt which contained provisions expressly prohibiting assignment thereof without their consent. The bankrupt, despite such prohibition, assigned certain accounts receivable to the Aetna Factors Company without obtaining the consent of such respondents." [101]

(2) inasmuch as the provisions in the sub-contracts prohibiting assignment were solely for the benefit of the obligors, the assignments were valid under California law as between the bankrupt assignor and the factor assignee [Johnson v. Lan-

ducci, 21 Cal. 2d 63, 67-68, 130 P. 2d 405, 408 (1942); Rosenthal v. Landau, 90 Cal. App. 2d 310, 202 P. 2d 810 (1949); Restatement, Contracts § 176 (1932); 4 Corbin, Contracts 496-497 (1951); 2 Williston, Contracts 1218 (Rev. ed. 1936); cf. Parkinson v. Caldwell, 126 Cal. App. 2d 548, 553-554, 272 P. 2d 934, 938 (1954).]

(3) the Referee's "Summary of Evidence" states: "Subsequent to the * * * assignment, the bankrupt continued to send invoices in the usual manner and received checks in payment thereof which it in turn endorsed and delivered to the factor. The court is satisfied that the factor knew of the provision in the contracts against assignment and adopted and used this practice to circumvent the prohibition," but that no finding was made as to whether or not these transactions were carried on with any intent to hinder, or to delay, or to defraud existing or future creditors of the bankrupt, or any of them [Bankruptcy Act § 67d(2)(d), 11 U.S.C. § 107(d)(2)(d); 4 Collier, Bankruptcy Par. 67.29, 67.37 and pages 372-373 (14th ed. 1940.]

(4) nor was any finding made as to whether or not the bankrupt and the assignee were, as to the fund in question or as to any of the transactions [102] given rise thereto, "co-adventurers", or "co-investors", or "participants in a common enterprise" [compare Consolidated Royalties, Inc. v. Ashton, 132 F. 2d 226, 230 (9th Cir. 1942) with In Re Lathrop, 61 F. 2d 37, 43-44 (9th Cir. 1932), overruled on another ground by Laugharn v. Bank of America, 88 F. 2d 551, 553 (9th Cir. 1937).]

It Is Now Ordered that the Referee's order of December 23, 1957, and the findings of fact and conclusions of law made in support thereof, are hereby set aside; and the matter is hereby recommitted to the Referee with directions:

(a) to hold further hearing on the trustee's petition as to the assignments in question;

(b) to make findings of fact and conclusions of law, inter alia, (1) as to whether or not any of the transactions involved were carried on with any intent to hinder or delay or defraud existing or future creditors of the bankrupt within the meaning of § 67(d)(2)(d) of the Bankruptcy Act; and, if not, (2) as to whether or not the bankrupt and the assignee were, as to the fund in question or as to any of the transactions giving rise thereto, "co-adventurers", or "co-investors", or "participants in a common enterprise"; and (c) to enter an appropriate order or orders thereon.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon

(1) Referee Joseph J. Rifkind;

(2) the attorneys appearing in the cause.

Dated: March 28, 1958.

/s/ WM. C. MATHES,
United States District
Judge. [103]

[Endorsed]: Filed March 28, 1958. Entered March 31, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

At Los Angeles, in said district, on the 25th day of April, 1958.

This matter came on to be heard before the undersigned Referee in Bankruptcy on February 20, 1957 and March 6, 1957, upon the petition of the Trustee in Bankruptcy for Order to Show Cause addressed to Aetna Factors Company, Fruehauf Trailer Co. and Com-Air Products, Inc. The Trustee in Bankruptcy appeared in person and by and through his counsel, Craig, Weller & Laugharn by William E. Bartley. Aetna Factors Company appeared by and through their counsel, Ventress and Labowe and Quittner, Stutman & Treister. Com-Air Products, Inc. appeared by and through their counsel, Alex D. Fred; Fruehauf Trailer Co. appeared by and through its counsel, Stanley A. Phipps. Motions to Dismiss based on lack of summary jurisdiction having been made, and evidence both oral and documentary having been offered and received into evidence, and further hearings having been held on July 16, 1957, July 31, 1957 and August 30, 1957, and various briefs and memoranda having been [104] filed by the parties; and the Court having entered its Order dated December 23, 1957, based upon Findings of Fact and Conclusions of Law therein made;

Aetna Factors Company having thereafter, on

January 2, 1958, filed its Petition to review the said Order of the Referee in Bankruptcy dated December 23, 1957; and the said Petition for Review having duly come on for hearing before Honorable William C. Mathes, United States District Judge, on February 24, 1958; and the said Honorable William C. Mathes having entered his "Order on Review of Referee's Order of December 23, 1957," on March 28, 1958, and having set aside the Referee's Order of December 23, 1957, and the Findings of Fact and Conclusions of Law made in support thereof, and having recommitted the matter to the said Referee in Bankruptcy for further proceedings in accordance with the terms of the said Order of March 28, 1958; and a further hearing having been held before the said Referee on April 15, 1958, upon due notice to all interested parties, and the said Trustee in Bankruptcy by and through his attorneys, Craig, Weller & Laugharn by William E. Bartley, and Aetna Factors Company by and through its counsel, Quittner, Stutman & Treister by George M. Treister, having appeared at the said hearing of April 15, 1958, and the Court being fully advised in the premises, now, therefore,

Upon the entire record in these proceedings, and in accordance with the Order of the Honorable William C. Mathes, dated March 28, 1958, the Court does hereby make its Findings of Fact, Conclusions of Law and Order, as follows, in lieu of the Findings of Fact, Conclusions of Law and Order of December 23, 1957:

Findings of Fact

I.

That prior to bankruptcy the bankrupt corporation and Fruehauf Trailer Co. entered into several contracts in writing [105] identical in form whereby the bankrupt was to manufacture and supply various bushings to the said Fruehauf Trailer Co. and the Fruehauf Trailer Co. was to pay for the said bushings when invoiced.

II.

That on the 28th day of October, 1955, the bankrupt entered into contracts in writing to manufacture and furnish to Com-Air Products, Inc. various bushings and the said Com-Air Products, Inc. agreed to pay the bankrupt corporation for the said bushings when invoiced.

III.

That for a period of a number of months prior to the filing of these bankruptcy proceedings, Aetna Factors Company and the bankrupt corporation engaged in factoring transactions whereby the said bankrupt corporation sold and assigned to Aetna Factors Company various of its accounts receivable, including the accounts receivable owing by Fruehauf Trailer Co. and Com-Air Products, Inc. which are involved in this litigation. That the said Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable were assigned to Aetna Factors Company on a non-notification basis, the obligor on the said accounts not being advised that the assign-

ments had been made. That Aetna Factors Company paid to the bankrupt corporation fair consideration for the accounts receivable sold and assigned as hereinbefore set forth.

IV.

That notice of intention to assign accounts receivable, in accordance with the provisions of Sections 3017 et seq. of the California Civil Code, was duly executed and filed by Aetna Factors Company and the bankrupt corporation, and within the time specified by the said provisions of the California Civil Code. Said notice of intention to assign accounts receivable was in general terms, as permitted by the said provisions of the California [106] Civil Code.

V.

That the aforesaid contracts and agreements between Fruehauf Trailer Co. and the bankrupt in paragraph 5 thereof all contained the following language: "Assignment. The contract resulting from the acceptance of this order or any interest thereunder, shall not be assignable nor shall any part of the work be sub-contracted by the vendor without prior written consent of the purchaser."

VI.

That the aforesaid contracts and agreements by and between the bankrupt and Com-Air Products, Inc. all provide in paragraph 15 "Assignment and Subcontracting. This Order may not be assigned or subcontracted in whole or in any part nor may any

assignment of any of the money due or to become due hereunder be made by the Vendor without prior written consent of the buyer in each instance."

VII.

That despite the foregoing provisions prohibiting the assignment of the Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable, the bankrupt did sell and assign the said accounts receivable to Aetna Factors Company as hereinabove set forth.

VIII.

That Fruehauf Trailer Co. and Com-Air Products, Inc. have never consented to the assignment of the monies owed by them to Aetna Factors Company; that prior to the institution of these proceedings by the Trustee in Bankruptcy, Aetna Factors Company made demand upon Fruehauf Trailer Co. and Com-Air Products, Inc. that they, and each of them, pay over the assigned accounts to Aetna Factors Company, but that Fruehauf Trailer Co. and Com-Air Products, Inc. refused to honor the said demand made by Aetna Factors Company. [107]

IX.

That a dispute exists between Fruehauf Trailer Co. and Com-Air Products, Inc. and Aetna Factors Company respecting the amounts owed by Fruehauf Trailer Co. and Com-Air Products, Inc.

X.

That Aetna Factors Company has heretofore

caused to be filed certain law suits in the Superior Court of the State of California, in and for the County of Los Angeles, seeking to recover from Fruehauf Trailer Co. and from Com-Air Products, Inc. all amounts which became due under the aforesaid contracts, plus interest from the dates that they become due.

XI.

That Fruehauf Trailer Co. and Com-Air Products, Inc. each have actively asserted, and by and through their counsel, and as parties to this proceeding claim that the provisions set forth in Findings of Fact No. V and VI above render the assignments to Aetna Factors Company unenforceable as to them.

XII.

That Aetna Factors Company, Com-Air Products, Inc. and the Fruehauf Trailer Co. did not file written answers contesting the jurisdiction of the Court within the time allowed in the Order to Show Cause which brought on these proceedings.

XIII.

That at the hearings herein the said Aetna Factors Company, Com-Air Products, Inc. and Fruehauf Trailer Co. made oral motions to dismiss for want of summary jurisdiction.

XIV.

That Aetna Factors Company did not have possession of the funds in question at the time of the filing of the Trustee's Petition and still does not have possession of the said funds.

XV.

That the assignments of the Fruehauf Trailer Co. and [108] Com-Air Products, Inc. accounts receivable to Aetna Factors Company were made for fair and valuable consideration, as above set forth, and were not made with intention to hinder, delay or defraud existing or future creditors of the bankrupt corporation, or any of them. That the said assignments were, on the contrary, made as part of routine factoring transactions.

XVI.

That the bankrupt corporation and Aetna Factors Company were not, as to the fund in question, or as to any of the transactions giving rise thereto, co-adventurers, co-investors or participants in a common enterprise. The relationship between the bankrupt and Aetna Factors Company was merely that of assignor and assignee of the accounts receivable in question; that there was no relationship other than as said assignor and assignee with respect to the monies in question, or at all.

Conclusions of Law

I.

That Fruehauf Trailer Co. does not dispute the right of the Trustee to the funds in the Trustee's possession and is therefore not a bona fide adverse claimant to the said funds.

II.

That Com-Air Products, Inc. does not dispute the

caused to be filed certain law suits in the Superior Court of the State of California, in and for the County of Los Angeles, seeking to recover from Fruehauf Trailer Co. and from Com-Air Products, Inc. all amounts which became due under the aforesaid contracts, plus interest from the dates that they become due.

XI.

That Fruehauf Trailer Co. and Com-Air Products, Inc. each have actively asserted, and by and through their counsel, and as parties to this proceeding claim that the provisions set forth in Findings of Fact No. V and VI above render the assignments to Aetna Factors Company unenforceable as to them.

XII.

That Aetna Factors Company, Com-Air Products, Inc. and the Fruehauf Trailer Co. did not file written answers contesting the jurisdiction of the Court within the time allowed in the Order to Show Cause which brought on these proceedings.

XIII.

That at the hearings herein the said Aetna Factors Company, Com-Air Products, Inc. and Fruehauf Trailer Co. made oral motions to dismiss for want of summary jurisdiction.

XIV.

That Aetna Factors Company did not have possession of the funds in question at the time of the filing of the Trustee's Petition and still does not have possession of the said funds.

XV.

That the assignments of the Fruehauf Trailer Co. and [108] Com-Air Products, Inc. accounts receivable to Aetna Factors Company were made for fair and valuable consideration, as above set forth, and were not made with intention to hinder, delay or defraud existing or future creditors of the bankrupt corporation, or any of them. That the said assignments were, on the contrary, made as part of routine factoring transactions.

XVI.

That the bankrupt corporation and Aetna Factors Company were not, as to the fund in question, or as to any of the transactions giving rise thereto, co-adventurers, co-investors or participants in a common enterprise. The relationship between the bankrupt and Aetna Factors Company was merely that of assignor and assignee of the accounts receivable in question; that there was no relationship other than as said assignor and assignee with respect to the monies in question, or at all.

Conclusions of Law

I.

That Fruehauf Trailer Co. does not dispute the right of the Trustee to the funds in the Trustee's possession and is therefore not a bona fide adverse claimant to the said funds.

II.

That Com-Air Products, Inc. does not dispute the

right of the Trustee to receive payment under the above-mentioned contracts and agreements between the bankrupt and Com-Air Products, Inc. and is therefore not a bona fide adverse claimant.

III.

That the various objections to jurisdiction and motions to dismiss made by Aetna Factors Company, Fruehauf Trailer Co. and Com-Air Products, Inc. were not timely taken and under Section 2 a (7) of the Bankruptcy Act this Court has summary jurisdiction over all matters herein contained. [109]

IV.

That the provisions in the Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable prohibiting the assignment thereof were solely for the benefit of the obligors of the said accounts; the assignments of the said accounts in contravention of the provisions against assignment were, under California law, valid as between the bankrupt assignor and Aetna Factors Company, as assignee.

V.

That accordingly, on the date of bankruptcy, a levying creditor of the bankrupt could not have obtained rights in the assigned accounts superior to those of Aetna Factors Company; the Trustee in Bankruptcy, therefore, obtained no right to the assigned accounts under Section 70c of the Bankruptcy Act as against Aetna Factors Company.

VI.

That the monies collected upon the said Fruehauf

Trailer Co. and Com-Air Products, Inc. accounts receivable by the Trustee in Bankruptcy are not assets of this bankruptcy estate, but are property of Aetna Factors Company.

VII.

That the assignments of the Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable by the bankrupt to Aetna Factors Company did not constitute transfers made with intent to hinder, delay or defraud existing or future creditors of the bankrupt, or any of them, within the meaning of Section 67d(2) (d) of the Bankruptcy Act, or any other provision of the Bankruptcy Act or the laws of the State of California.

VIII.

The bankrupt and Aetna Factors Company were not, as to the accounts receivable in question or as to any of the transactions giving rise thereto, or at all, co-adventurers, co-investors, or [110] participants in a common enterprise.

IX.

The Trustee's Petition for Order to Show Cause addressed to Aetna Factors Company, Fruehauf Trailer Co. and Com-Air Products, Inc. should be denied, and the Trustee should turn over to Aetna Factors Company all monies collected by him upon the Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable.

Upon the foregoing Findings of Facts and Conclusions of Law, it is

Ordered, Adjudged and Decreed:

1. That the Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable, which are the subject of this controversy, are property of Aetna Factors Company and do not constitute assets of this bankruptcy estate.

2. That the monies collected by the Trustee in Bankruptcy upon the said Fruehauf Trailer Co. and Com-Air Products, Inc. accounts receivable belong to Aetna Factors Company and shall be turned over to it by the said Trustee.

3. That Aetna Factors Company may take such further steps as in its discretion appear appropriate, in a court of competent jurisdiction, to establish as against Fruehauf Trailer Co. and Com-Air Products, Inc. the amounts owing on the accounts receivable assigned by the bankrupt to Aetna Factors Company.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

Approved as to form:

CRAIG, WELLER &
LAUGHARN,
/s/ By WILLIAM E. BARTLEY,
Attorneys for Trustee in
Bankruptcy. [111]

[Endorsed]: Filed April 25, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL RE AETNA FACTORS CO.

Notice Is Hereby Given that the Trustee in Bankruptcy in the above-entitled matter, Irving I. Bass, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order on Review of Referee's Order of December 23, 1957 entered by the District Court of the United States for the Southern District of California, Central Division, on March 31, 1958, and dated March 28, 1958.

Dated: April 30th, 1958.

CRAIG, WELLER & LAUGHARN,
/s/ By WILLIAM E. BARTLEY,
Attorneys for Trustee. [112]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 30, 1958.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75 of the Rules of Civil Procedure, Irving I. Bass, appellant and Trustee in Bankruptcy for the Estate of Zipco, Inc., a California corporation, hereby designates for inclusion in the record on appeal to the United States Court

of Appeals for the Ninth Circuit, the following documents, said appeal having been taken by Notice of Appeal filed April 30, 1958:

1. Petition for Arrangement under Chapter XI of the Bankruptcy Act filed April 5, 1956;

2. Order of Reference referring the matter to Referee Joseph J. Rifkind dated April 5, 1956;

3. Order adjudicating the debtor corporation a bankrupt, dated May 7, 1956;

4. Order appointing Irving I. Bass Trustee in Bankruptcy;

5. Petition for Order to Show Cause of Trustee in Bankruptcy, dated February 5, 1957;

6. Order to Show Cause against Fruehauf Trailer Co. and [114] Aetna Factors Co., issued February 5, 1957;

7. Order to Show Cause against Com-Air Products, Inc. and Aetna Factors Co. issued February 5, 1957;

8. Order to Show Cause vs. Aetna Factors Co. filed February 5, 1957;

9. Memorandum of Points and Authorities re Aetna Factors Co. filed March 11, 1957;

10. Memorandum Opinion of Referee dated May 10, 1957;

11. Notice of Motion to Reconsider filed June 10, 1957;

12. Supplemental Memorandum of Aetna Factors Co. dated July 31, 1957;

13. Trustee's Memorandum of Points and Authorities filed August 29, 1957;

14. Supplemental Memorandum Opinion of Referee filed October 15, 1957;

15. Findings of Fact, Conclusions of Law and Order dated December 23, 1957;

16. Petition for Review of Aetna Factors Company filed January 2, 1958;

17. Trustee's exhibits No. 1 and 2;

18. Petitioner's exhibits "A", "J", "K";

19. Transcript of Hearing of July 31, 1957;

20. Referee's Certificate on Review dated January 24, 1958;

21. Memorandum of Aetna Factors Co. on Petition to Review Order of Referee in Bankruptcy dated December 23, 1957, filed with the United States District Court on or about January 30, 1958;

22. Trustee's Memorandum of Points and Authorities in Opposition to Petition for Review of Order of Referee dated December 23, 1957, filed on or about February 10, 1958;

23. District Court's Order on Review of Referee's Order of December 23, 1957, dated March 28, 1958 and entered on [115] March 31, 1958;

24. Findings of Fact, Conclusions of Law and Order (Trustee vs. Aetna Factors Co.) signed and entered on or about April 25, 1958;

25. Notice of Appeal filed April 30, 1958.

Dated: April 30, 1958.

CRAIG, WELLER &
LAUGHARN,
/s/ By WILLIAM E. BARTLEY,
Attorneys for Appellant and Trustee in Bankruptcy for Zipco, Inc., a California corporation. [116]

Affidavit of Service by Mail Attached. [117]

[Endorsed]: Filed April 30, 1958.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS ON APPEAL

Comes now Irving I. Bass, appellant and Trustee in Bankruptcy for the estate of Zipco, Inc., a California corporation, and presents his points on which he intends to rely in support of his contention that the District Court erred:

1. Erred in paragraph (2) of the "Order on Review of Referee's Order of December 23, 1957" in finding and ruling as a matter of law that "Inasmuch as the provisions in the sub-contracts prohibiting assignment were solely for the benefit of the obligors, the assignments were valid under California law as between the bankrupt assignor and the factor assignee";

2. Erred in ordering that the Referee's Order of December 23, 1957 and the Findings of Fact and Conclusions of Law made in support thereof be set aside;

3. Erred in not affirming and adopting each and every of the Referee's Findings of Fact and Conclusions of Law of December 23, 1957;

4. Erred in not affirming the Referee's Order of [118] December 23, 1957 and in not dismissing the Petition for Review;

5. Erred in recommitting the matter to the Referee with directions to hold a further hearing;

6. Erred in recommitting the matter to the Referee with directions to make Findings of Fact and Conclusions of Law as to whether or not any of the transactions involved were carried on with any intent to hinder, delay or defraud existing or future creditors of the bankrupt within the meaning of Section 67(d) (2) (d) of the Bankruptcy Act and as to whether or not the bankrupt and the assignee were, as to the fund in question, or as to any of the transactions giving rise thereto "co-adventurers" or "co-investors" or "participants in a common enterprise", and in ordering the Referee to enter appropriate Order or Orders based upon the said Findings of Fact and Conclusions of Law.

Dated: April 30, 1958.

CRAIG, WELLER &
LAUGHARN,

Attorneys for Appellant and Trustee in Bankruptcy, Irving I. Bass, for Zipco, Inc., a California corporation. [119]

Affidavit of Service by Mail Attached. [120]

[Endorsed]: Filed April 30, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled matter:

A. The foregoing pages numbered 1 to 120, inclusive, containing the original:

(Certified copy) Order approving appointment of Trustee

Petition for Order to Show Cause

Order to Show Cause against Fruehauf Trailer Co.

Order to Show Cause against Com-Air Corporation

Order to Show Cause against Aetna Factors Co.

Memorandum of Points and Authorities in support of Aetna Factors Co., on order to show cause

Memorandum Opinion re Order to Show Cause v. Aetna Factors, Fruehauf Trailer Company and Com-Air Products, Inc.

Notice of Motion to Reconsider

Supplementary Memorandum of Aetna Factors Company

Trustee's Memorandum of Points and Authorities in support of Memorandum Opinion re Aetna Factors Co.

Supplemental Memorandum of Opinion — Order

to Show Cause v. Aetna Factors, et al. re Assignment of Accounts Receivable

Findings of Fact, Conclusions of Law and Order re Aetna Factors Company, filed 12/23/57

Petition of Aetna Factors Company for Review of Order of Referee in Bankruptcy dated December 23, 1957

Certificate on Review from Referee's order dated Dec. 23, 1957

Memorandum of Aetna Factors Company on Petition to Review Order of Referee in Bankruptcy, dated 12/23/57

Trustee's Memorandum of Points and Authorities in opposition to Petition for Review of Order of Referee dated 12/23/57

Order on Review of Referee's Order of December 23, 1957

(Certified copy) Findings of Fact, Conclusions of Law and Order (Trustee v. Aetna Factors Company), filed 4/25/58

Notice of Appeal

Appellant's Designation of Contents of Record on Appeal

Appellant's Statement of Points on Appeal.

B. Trustee's Exhibits 1 and 2; Petitioner's Exhibits A, J and K.

C. One volume of Reporter's Transcript re Motion to Reconsider Court's Decision announced in Memorandum Opinion May 10, 1957, made on Wednesday, July 31, 1957, etc.

I further certify that my fee for preparing the

foregoing record, amounting to $1.60, has been paid by appellant.

Dated: June 2, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk,
/s/ By WM. A. WHITE.
Deputy Clerk.

District Court of the United States, Southern District of California, Central Division

In Bankruptcy, No. 71,250-WM

In the Matter of
ZIPCO, INC., Bankrupt.

MOTION TO RECONSIDER COURT'S DECISION ANNOUNCED IN MEMORANDUM OPINION MAY 10, 1957, MADE ON WEDNESDAY, JULY 31, 1957, AT 11:00 A.M.

Before the Honorable Joseph J. Rifkind, Referee in Bankruptcy.

Appearances: For the Trustee: Craig, Weller & Laugharn, By: William E. Bartley, Esq. For Aetna Factors: Quittner, Stutman & Treister and Labowe & Ventress, By: George M. Triester, Esq., and R. B. Labowe. For Amicas Curiae: Birnbaum & Hemmerling, By: Clifford A. Hemmerling, Esq. [1]*

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Wednesday, July 31, 1957. 11:00 A.M.

The Referee: Are you ready to proceed in the Zipco matter?

Mr. Triester: Ready, your Honor.

Mr. Bartley: Ready for the Trustee.

The Referee: The status of this matter now is, of course, that the findings of fact and conclusions of law have been submitted by the attorney for the Trustee, and objections and exceptions thereto have been filed, and they have been accompanied by a motion for rehearing or rather reconsideration. I believe is the proper term.

In other words, it is not proposed to introduce additional evidence, but merely a reconsideration and further argument.

Mr. Triester: That is correct—strictly legal matters.

When the matter was first called, Mr. Hemmerling asked leave to be heard in connection with the matter and perhaps to file points and authorities as amicus curiae. He would like to address the Court briefly on that.

The Referee: All right.

Mr. Triester: I would like to point out to the Court why we have taken such an unusual step as moving to reconsider after the Court has considered the matter so [2] thoroughly already, and written a memorandum opinion, showing obvious familiarity with all of the authorities.

As I say, I think we are going to be in agreement with the Court on almost every important

point except one, which, I think, requires a different conclusion.

The importance of this case is tremendous. Since being retained by Aetna Factors, we have been contacted by probably as many as half a dozen either factoring firms or banks or attorneys for banks. I might just name some of them who have contacted us with the request that they be allowed to file amicus curiae briefs.

We advised each of them, after discussing the matter, to see if they have anything to add that had not occurred to us, or anything new—we, of course, could not tell them not to file briefs, but we felt that we had the arguments sufficiently under control, and so forth, that it would be more of a burden to the Court than an aid to the Court.

I would like to name some of them who have contacted us. The Bank of America is one; the Citizens Bank, both of which do a considerable amount of accounts receivable financing.

We were contacted by other factors, but not by Standard Factors, which is Mr. Hemmerling's client.

In the case of Standard Factors we requested that they do ask leave of Court to file an amicus curiae brief [3] for the reason, in the first place, they had a little bit different approach to the problem. Their conclusions were the same, but their approach was different, and I thought it would be helpful to the Court.

In the second place, because of the distinguished reputation of Mr. Birnbaum, of the firm of Birn-

baum and Hemmerling, we thought because of his obvious standing in the field of commercial transactions and being head of a committee of the ABA involving commercial transactions, we felt with respect to the matter of this specific situation in this particular case we did ask them to prepare such a memorandum.

I have already had a copy of the memorandum given to Mr. Bartley this morning, and I would join in Mr. Hemmerling's request that they be allowed to file a memorandum after my argument. Also, if Mr. Hemmerling feels something else should be entered by way of oral argument, I should also request that the Court hear his oral argument.

Certainly the amount in controversy here doesn't justify reconsidering or taking more of this Court's time after the full hearing already had, nor does it justify the filing of amicus curiae briefs, but the principle involved, which I will attempt to tell the Court, a decision to this effect will completely make impossible non-notification factoring, a very common financing device. [4] and a very useful financing device. Not only will it make non-notification factoring impossible where the factor does not advise the obligor on account, because of the impairment of the credit standing of the assignor, but it will put a handicap on notification factoring, because the factor can never be sure if there is such a non-assignability clause: he may have to investigate, and it will seriously burden notification factoring and probably make it impossible as to notification factoring.

This is a very bad result to reach if it is compelled by the authorities, for reasons that Mr. Hemmerling will allude to if allowed to file amicus curiae memoranda.

Mr. Hemmerling: May I add something? The fact that Mr. Birnbaum is not here today is not an indication that he doesn't feel this matter is important. His participation in this unfortunately is via Transatlantic telephone, because he is currently in Europe at the Bar convention, so that I am substituting in his place, so to speak.

Mr. Bartley: I have no objection to any person or party filing an amicus curiae in any matter which is presented in court. The law is the law, regardless of who presents the law.

I have before me a copy of the brief of Birnbaum and Hemmerling; I haven't had an opportunity to read it but I would like to have an opportunity to answer it, and I doubt that there is time in the courtroom to adequately [5] read and digest the material contained in the brief.

I was also served with a copy of supplementary points and authorities of Aetna Factors.

Mr. Triester: May I hand mine to the Court? It is submitted basically, your Honor, so that it can be referred to in my oral argument.

The Referee: Very well. Standard Factors will be permitted to appear and be heard as amicus curiae.

I want to say this before you start, Mr. Triester, that Mr. Bartley on behalf of the Trustee and Mr. Labowe on behalf of Aetna came into court thor-

oughly prepared and ably presented their matter. I want to particularly stress insofar as Mr. Ludowe is concerned, that he did an excellent lawyer-like job, and I emphasize that for this reason: I have always contended that any good lawyer with the proper amount of preparation can handle a bankruptcy matter just as competently as a so-called bankruptcy expert, and I didn't want to leave any impression that he didn't do anything that any bankruptcy expert could have done. He presented his case thoroughly and well.

I feel because he is a young man that the Court should go out of its way to make that comment, and the fact that the Court had this matter under submission for some time indicates the effectiveness of his argument and briefs better than anything that can be said.

He raised some very serious questions of law. There [6] weren't any questions of fact: the questions of fact were very simple, it was simply a question of law.

The only question of fact that is presented by the motion to reconsider is whether or not the amount that was due and payable from Com-Air and Fruehauf was a correct amount.

If the matter had been determined in favor of the factors, it would not have been necessary to determine the amount, because the factors have actions pending against both obligors. However, since it was determined in favor of the Trustee, and the Trustee's counsel stipulated those were the correct

amounts, the Court made that decision, so I don't think that is too important.

I think we should narrow and restrict ourselves and confine ourselves to the questions of law involved here.

It is true it involves a very serious situation, because so many, many bankrupt estates will be depleted if these assignments are considered valid, where there is a provision in the purchase order against assignment.

On the other hand, many factors who have purchased accounts receivable with such provisions against assignment will sustain very serious losses, so it is very serious both ways, and for that reason the Court did give it careful consideration, and read not only the cases which were cited by counsel, but innumerable cases which neither of them had cited, and I spent six or seven evenings [7] in connection with the independent research of the matter.

Of course, it does not affect the assignment or factoring of accounts, nor does it involve the recording of notice under Section 3017 of the Civil Code. The question is simply whether or not an assignment of accounts receivable under purchase orders which expressly prohibit the assignment of such accounts is valid as against the creditors of the bankrupt estate, represented by the trustee in bankruptcy, where the money had not yet been paid to the bankrupt or to its alleged assignee prior to bankruptcy. That was the thinking of the Court, and the Court has obviously indicated in its

opinion heretofore filed that it had reached, the conclusion that under purchase orders of this type containing provisions against assignment, that a creditor could have levied an execution, upon Fruehauf and Com-Air, and therefore the trustee occupying the status of an actual or hypothetical creditor under Section 70 of the Bankruptcy Act, is entitled to the unpaid money which was in possession of such obligors when bankruptcy was filed.

I think the opinion of the Court indicated that, but if it didn't, that is the reason for the ruling.

Mr. Triester: I quite understand the rationality of the Court.

I would like to say one more thing by way of [8] emphasizing the importance of the problem, and that is such a large percentage, particularly of defense contracts contain this provision, that we do have a problem of very great magnitude.

The Referee: We can take cognizance of the fact that there are other bankrupt estates in which there are defense contracts which have the same clause in the contracts and which also have been factored.

Mr. Triester: I would say most of them do.

The Referee: And the Court has now under submission several of those involving that situation.

Mr. Triester: I think the amount that will be spent on attorneys fees will far exceed, I am sure, before this litigation is concluded—because I assume that the Trustee is just as interested in this point as we are—will be more than the amount in controversy here.

In any event, I would like to first outline to the Court the areas of agreement that we have, with the Court's opinion, and which we do not challenge here.

In the first place, I quite agree with the Court's decision on summary jurisdiction. I have no doubt that this Court has summary jurisdiction of this controversy.

As a matter of fact, even if the Court did not have, were it within our province to waive the objection to summary jurisdiction, we should do so in a problem that pertains to factoring so that it should be presented here [9] in the first instance.

So we have no quarrel with the summary jurisdiction holding.

The next point we agree with the Court is the validity of this stipulation against assignment in the Fruehauf and Com-Air purchase orders, and the effect to be given it in a proceeding of this sort is a matter to be determined by state law. The Court so stated on page 4 of its opinion.

The Referee: As between the parties.

Mr. Triester: As between the parties the state law will govern, and the Bankruptcy Act is important because it incorporates and gives effect to that state law under Section 70-c of the Bankruptcy Act.

The Referee: In other words, Erie vs. Tompkins, which reverses Swift vs. Tyson, simply is to the effect that when a Federal Court, and the same, of course, applies to a Bankruptcy Court, is interpreting a contract, that the law in the particular

state where the contract has been entered into is the prevailing law. Of course, neither Erie vs. Tompkins or any of those cases involved the rights of a trustee in bankruptcy in relation to this situation.

To make that clear, for instance, an unrecorded chattel mortgage might be valid as between the parties, and certainly if it is not recorded it is void as to the [10] trustee in bankruptcy, and similar situations.

Mr. Triester: That is right.

The Referee: And similar situations of that sort: assignments of accounts receivable may be valid between the parties, if notice is not recorded it may be void, and so on and so forth.

Mr. Triester: We agree with that. The Bankruptcy Act governs, but to the extent that it looks to state law in this controversy, we must look to state law and I think here the state law will control, there is no doubt about it.

We are in agreement with the Court's next holding, namely, that we agree that the Court correctly interprets the trustee lien creditor status on the date of bankruptcy on page 5 of the opinion.

At this point I think this may be superfluous but I think this is the only provision under which the Trustee can prevail, under Section 70-c of the Bankruptcy Act. I would like to just emphasize again what the Trustee gets. He gets title to all property, and it is no longer necessary that the property be in the possession of the Court at all, and under Section 70-c of the Bankruptcy Act the

Trustee is vested with all rights, remedies and powers of a creditor then holding a lien thereon by legal and equitable proceedings, whether or not such a creditor actually exists, which refers to the date of bankruptcy. [11]

In other words, as of the date of bankruptcy if a creditor of the bankrupt could get a lien on the property involved in the controversy, the Trustee must prevail under Section 70-c.

I don't know. Perhaps I may go further in following Constance vs. Harvey than the Court does.

Constance vs. Harvey is a wholehog decision, and I have urged and relied on that case when I have been on the other side of these controversies, and I don't intend to back away from Constance vs. Harvey now.

If a hypothetical creditor, whether or not there be one, could have on the date of bankruptcy garnisheed Fruehauf or Com-Air and prevailed over Aetna Factors, then the Court's decision is correct. I think that it is true that if the hypothetical creditor could have so garnisheed on the date of bankruptcy, you must look to the state law, because it is the law of the State of California that determines what a garnisheeing credit could get on the day of bankruptcy which controls. Therefore, I say the state law will determine this controversy, because there is no dispute at all but that Section 70-c as applied here in the state law is correctly construed. It is a California state law, of course, because this is the law which gives substance to controversies arising in this jurisdiction.

Finally, then, we agree with the Court's holding [12] the statement of the general proposition that an agreement which is binding between the parties may under certain circumstances be invalid as against the creditors of one of the parties. We don't dispute that at all; we are in agreement.

There is one point where we disagree with the Court's conclusion, but before I get to that I would like to make one point clear for the purpose of this motion to reconsider.

We want to prevail on the real issue in controversy here, namely, whether or not a non-assignability clause in a purchase order is valid and enforceable when the assignor goes into bankruptcy. This is not a dispute between the factor and the obligor, but it is a dispute between the factor and the trustee in bankruptcy of the assignor. We want to prevail on that point. We want to be able to convince the Court we are correct, despite assignments in violation of a non-assignability clause in a purchase order, and that the assignor, if he goes into bankruptcy, his Trustee in bankruptcy does not prevail against the factor, assuming, of course, that an assignment was made for valid consideration, and there has been recordation of notice of intention to assign under Section 3440, and so forth.

There are a couple of technical points on which we could make a good legal argument to the Court, which [13] would enable us to win at least part of this lawsuit, but would not justify the spending of the money to win it.

I think in the controversy in the Parkinson

case we could distinguish the language in the Com-Air and the Fruehauf purchase orders, and I think——

The Referee: The Court pointed out that there was a very decided difference in the language, which was one of the many things that concerned the Court very much. One of them was very specifically related to the non-assignability of the proceeds, as well as the contract. The other did not go quite so far, and I think I commented upon that, in my opinion.

Mr. Triester: We don't wish to press that point here. I think as a lawyer I owe my client the obligation of preserving the point, but that is not why we are here asking the Court to reconsider the decision; we are out for the main issue in the case.

I think there is also another point—I believe it is the law of the State of California that when provisions of this sort are inserted in lengthy documents in fine print, the Supreme Court of the State of California, I believe, the Supreme Court has held it is not even enforceable between the parties. This again we don't wish to make an issue of before this Court, for the reason that all they would do in the future is increase the size of the [14] type, and we would have won nothing in the long run, so I merely call that to the Court's attention. We are after the whole apple in this case; the basic issue.

We want to win on the ground that even if we concede this is between Aetna Factors and Frue-

hauf and Com-Air that they can enforce their non-assignability clauses against Aetna Factors and insist upon paying the Trustee rather than us; in other words, we can still disregard the non-assignability clause in a case between Aetna and the bankrupt or the bankrupt's Trustee in bankruptcy, and we believe we will convince the Court in this case that the Trustee has no greater rights than the bankrupt had at the date of bankruptcy.

The way this case has worked out, the Trustee literally stands in the shoes of the bankrupt, because the bankrupt's creditors had no greater right than the bankrupt did on that date.

I might say this: The Court might wonder about this point—is this a new concept with me as to the enforceability of non-assignability clauses? I would say it is not.

I was before this Court in the Delta Air case. The Delta Air accounts receivable from North American contained a non-assignability clause, and we made no point of it to the Court, representing the Trustee, because at that time I was not aware of this Court's decision in [15] the Zipco case. I don't believe it had been rendered.

It would be my independent conclusion it was not enforceable in a suit between a Trustee and the factor.

North American might have been able to pay the Trustee, but if they had, if Aetna were to claim it from the Trustee, it would come to the Trustee impressed with all of the equitable rights between the assignor and assignee, so this is not a new

position, because of the exigencies in this particular case require that position.

This is a matter which I felt strongly about for quite some while.

I may be wrong, but I interpret one of Mr. Bartley's proposed findings, and I refer to No. 6, I believe that Mr. Bartley, at least in his finding, concedes my point, namely as between the assignor and assignee, as between the bankrupt and Aetna the assignment is good despite it being made in violation of a non-assignability clause.

That conclusion of law says: "That under California State Law the above set forth clauses in the contracts between Com-Air Products, Inc. and the bankrupt and Fruehauf Trailer Company and the bankrupt are enforceable in the assignment to Aetna Factors Company would be void, save and except as between the bankrupt and Aetna Factors Company."

Now, I am willing to almost concede that it could be enforceable in this instance or in a great many cases. [16] The obligor on the account could insist on the enforceability of the non-assignability clause, but once you concede to me it is not enforceable as between a bankrupt assignor and the factor, I think the legal decision must go the other way for the reasons I am going to come to in just a moment.

The Referee: Of course, the findings of fact and conclusions of law and order submitted by Mr. Bartley are not necessarily those which the Court will sign, and I think all of you know that this Court has on occasion prepared its own findings

and in many instances greatly revised the findings submitted.

Mr. Triester: I doubt very much, too, if the Court could adopt it in our favor. I believe that the Court's judgment would be inconsistent, if the Court said in its opinion it may be valid between the parties and still invalid between——

The Referee: I don't think I decided that in this matter.

Mr. Triester: I will withdraw that.

This brings me back to the place where we agree and disagree at the same time.

We agree with the general proposition, as the Court has stated, that it may be valid between the parties and invalid as against the creditors for one of the parties, but we say this: In the State of California, absent [17] some special statute, a levying creditor gets only his debtors' rights when he makes his levy. That is to say if there are equitable rights in favor of "X" in a piece of property and a creditor levies on that property, he gets only his debtor's rights, whether or not he had notice of these equitable rights or not, in the absence of a special statute.

What are these special statutes? We have a lot of them: Failure to record a chattel mortgage makes it void as against creditors, because the statute says so, even though it is good as between the parties; failure to record, failure to record an intention to assign accounts receivable makes an assignment void as against the creditors of the assignor, even though it is valid between the parties.

In this case that problem doesn't exist; that is not involved in our controversy.

The notice was recorded properly under Section 3440, failure to give notice of a bulk sale, creditors of the seller—is void against between the parties.

Failure to give notice of a manual delivery, the transaction between the parties is perfectly valid, but the creditors can set it aside.

Take another example, conditional sales contracts. Suppose a creditor has no notice of a conditional sales contract in existence, if he levies on that property in [18] the possession of the debtor his levy reaches only his debtor's right; he gets no greater right than the conditional buyer had. Why? Because there is no statute in this state, unlike in states that have a uniform conditional sales act, but there is no statute in the State of California, I think, except in the case of—equipment, there is no statute requiring conditional sales contracts to be recorded or notice thereof be given to anybody, so a debtor whose property is subject to a conditional sales contract, if one of his creditors levies on it, he gets only his creditor's rights, and that is exactly the same situation we have in this state in connection with accounts receivable in violation of a non-assignability clause. There is no special statute, I will submit in a moment, nor is there any law which gives a levying creditor on an account receivable that has been assigned any greater right than the assignor had at the time of levy, and I think that is the crux of this case, because that tests the trustee in bankruptcy's right.

Could a levying creditor under date of bankruptcy prevail over Aetna when it levied on Zipco's accounts receivable from Com-Air, and the answer is no, he could not, because as between Zipco and Aetna, Zipco had nothing and Aetna had all the ownership to the accounts.

To be sure, Com-Air may have had some right to refuse to pay Aetna directly, but if they had paid Zipco, Zipco [19] of course, would have to turn it over to Aetna, because there is no special statute giving the levying creditor, and therefore, the trustee in bankruptcy, any greater right than Zipco had at the date of bankruptcy.

Now, the matter boils right down to this: As between Aetna and Zipco on the day of bankruptcy, what right did Zipco have or what right did the creditor of Zipco have?

We think the authorities in this state, there are three, and they are directly in point. There are others which discuss the problem, but which are not directly in point, but the only three cases in this state, I submit, which involve a dispute as between the assignor and assignee are Johnston vs. Landucci, O'Neill vs. O'Malley and the Rosenthal, I think, is the case, Rosenthal against Landau.

Those three cases involve assignments of causes of action in violation of non-assignability clauses, and they involve a fight over the accounts as between the assignor and the assignee or their representatives, and in each of those three cases the Court upheld the right of the assignee, despite the violation of the non-assignability clause.

Now, what is the distinction? Before I pass on, I would like to mention that Parkinson vs. Caldwell is not in point. I would like to say those three cases not only are the law of the State of California, but they seem to [20] be the general rule in most of the states.

On page 6 of my supplementary memorandum I have a quotation from 148 ALR.

The Referee: I read the article at the time.

Mr. Triester: At page 6, at the bottom of my memorandum there is a quotation from 5 Cal. Jur. 2d, summarizing the State of California law and Witkins' most recent summary.

The Referee: I didn't read Witkins.

Mr. Triester: It is to the same effect as Cal. Jur. 2d.

I would like to emphasize one authority that I am sure the Court has read, but I would like to emphasize it, because it deals with the problem as to what are the rights between the assignor and assignee assuming that the obligor on the account, Com-Air and Fruehauf, can insist on enforcing the non-assignability clause.

Williston says, and I have quoted from his treatise in the matter, and the quotation is on page 4 of my memorandum:

"A prohibition of assignment or a condition constricting performance of the debtor's obligation to the original promisee is intended for the benefit of the debtor and cannot affect the legal or equitable rights of the assignor and assignee as between themselves. Accordingly, if the assignor should

collect the assigned claim, he [21] would be bound to pay what he had collected to the assignee."

Namely, at the time Zipco or their representative, the Trustee in bankruptcy, should collect the assigned claim, it would be bound to pay what he collected to the assignee. That is why I say we can both enforce the non-assignability clause as to the parties under the original contract. Zipco and Com-Air may be able to insist upon performance, although in this state they couldn't even do that, I take it.

If their obligation would not be increased by paying directly to the assignee—I could probably point out a lot of situations where the obligor couldn't insist on the enforcement of the non-assignability clause, but assuming that Com-Air and Fruehauf did insist in this case, because of their obligation to the assignee—assuming that they could enforce it, they would still, according to Williston, be bound to pay what they collected to the assignee, and it may be that a practical matter would be that we would have to look to the Trustee in bankruptcy to collect these accounts or mechanically set it up in that way, although, I take it, Com-Air and Fruehauf have no reluctance to pay the assignee the undisputed amounts directly, if the Court should adjudicate that the assignee is entitled to these accounts.

The Referee: That wasn't their position here. They [22] took the position these provisions were necessary to give them the control and supervision by way of offsets and rejects, and prevent getting

irresponsible persons in on the contract, and I suppose it is very much the same object that they have that the Government has in Section 203, Title 31 of the United States Code.

Mr. Triester: There is a tremendous overriding policy in the Government. I think the Martin case is in our favor.

The Referee: The Martin case simply says where the Government has already paid the money for distribution amongst the lien holders, that they didn't——

Mr. Triester: The Government's public policy is so that it doesn't lead to bribery of Government persons or—as the Court states, the Government should not be put in a position as dealing with innumerable persons, and so on and so forth, and that rationality can be applied to the validity of this provision on behalf of Fruehauf and Com-Air.

In the Delta matter we have other factors, and also GMC, which is under submission, we have other factors, and so on.

The only point I want to make is to be sure Com-Air and Fruehauf concede—enforce the non-assignability provision—detriment by reason of an offset, and certainly Aetna can get no greater right as against Fruehauf [23] than Zipco had.

The Referee: We have had some cases where the money was paid to the assignee before bankruptcy, I have ruled that the trustee in bankruptcy did not have a right to recover, merely because the contract had a non-assignability clause, on the ground that it was enforced and carried out

and executed before bankruptcy and is not a preference.

Here we have a situation where Com-Air and Fruehauf have actually refused to pay the money and it still hasn't been paid.

Mr. Triester: I might say this also, the situation in O'Neill vs. O'Malley, the Veterans' Welfare Board was involved in that case, and refused to recognize the assignee until the Court had resolved the controversy.

I might say this, though, if the Court's holding on this point now is correct, then in every case where the money is paid within four months before bankruptcy the trustee should be allowed to institute plenery suit to recover the preference. Why? Because until payment the transfer isn't perfected, according to your holding.

If perfection takes place within a four months period, that is when the transfer is made.

The Referee: Let me give you another thought. As you know, I had this matter under submission for some months. This Court does not take matters under submission [24] very long.

One of the things that went through my mind in this matter—I am not sure that I read all of the cases you have cited in your supplemental brief, but I certainly read the ALR, but one of those things that bothered me in those cases that were cited was this: many of them held where there was an agreement to sell real estate or personal property, for that matter, and had a provision against assignment that was for the benefit of the

conditional vendor, and if there was an assignment by the conditional vendee it was a battle between the parties, that is between the conditional vendee and the assignee because it was subject to the contract. However, none of those cases did I consider comparable and parallel to our situation, because here it involved the matter of paying money by Com-Air and Fruehauf in this case, and in others where I have the same problem where the right of the Trustee intervened before the payment was made, wherein those other cases it was simply that they took it subject to the residual title remaining vested in the conditional vendor.

In other words, there wasn't any question that the conditional vendee had an equity in the real or personal property which he could pass on. That was part of the thinking that went through my mind. It may be sound or it may not, but I am indicating to you why many of those cases that were cited in the ALR and were cited by counsel [25] I did not consider applicable.

Mr. Triester: All we are talking about is money here. Assuming there are no offsets, and in some cases Witkin indicates if all it calls for is the payment of money, even the obligor can't insist upon enforceability.

The other distinction, and frankly—in the Portuguese Bank case Mr. Justice Holmes, opinion, although the U. S. Supreme Court law——

The Referee: You don't feel towards Justice Holmes as does Professor McLaughlan.

Mr. Triester: No, I certainly do not. If I did,

I would not say it, but he does make the holding in that case, and it was merely a claim against the estate. There was no land contract, there was money, just like an account receivable, and he holds as between assignor and assignee the non-assignability clause will be disregarded.

In that case, as I recall, the obligor was a Governmental agency, the Board of Public Works.

We say that the assignor can't prevail or insist upon the enforceability of these non-assignability clauses, therefore his Trustee in bankruptcy cannot, because there is no special statute applicable to this situation, giving the creditors of the assignor any greater right than the assignor had, and therefore, the general rule prevails that creditors who levy get only what the debtor had at the time of the levy. [26]

I would like to distinguish Parkinson vs. Caldwell. I don't wish to do it at great length, because Mr. Birnbaum or Mr. Hemmerling have analyzed the case very thoroughly, and I am completely in accord with their analysis.

Parkinson vs. Caldwell is a most remarkably complex fact situation, but upon analysis it is a suit between competing rights of the obligor and the assignee.

The Court will recall it was the nephew versus the pledgee of this note. The nephew is the one who, if that non-assignability clause is not enforced, will have to pay extra taxes on the nephew's estate, because he is the only one that has an interest in the estate, that of the aunt's which executed the

note in question, so the nephew is the obligor in effect, and his rights are exactly that of the maker of that note, and where he can show it would be a hardship on him not to enforce the non-assignability clause, we will concede that the obligor itself can enforce them, but that is why Parkinson vs. Caldwell is not in point. It is not a suit between assignor and assignee or the creditor's representatives of either of them nor contemplating interests between the obligor and assignee, and certainly this must be sound, otherwise the District Court of Appeals would have had to at least mention Johnston vs. Landucci and the other two decisions.

The Referee: In the Parkinson vs. Caldwell, I quoted my opinion beyond that which was necessary. They say, [27] finally, in other words, after the disposition of the case, appellants argue that to permit the uncle's estate to recover the proceeds of the note will result in its unjust enrichment, since the uncle received the money, the repayment of which was attempted to be secured by the pledge of this note. It was established in the trial court that the estate of the uncle was insolvent, and that the nephew has a claim against the uncle's estate of approximately $10,000 for taxes which the uncle *paid* to pay on the trust estate during his lifetime.

I should underscore the word "finally," but remember, the Court reached its conclusion prior.

Mr. Triester: I read that word "finally," differently. They haven't disposed of the case, because to dispose of the case they must answer the unjust enrichment argument.

The Referee: I read Mr. Hemmerling's brief, and I merely interrupt to indicate that I was not unmindful of the Parkinson case, at least that phase of it.

Mr. Triester: We think Parkinson vs. Caldwell, it is hard to say, because the fact situation is so complicated and the language of the Court has to be read—it is the latest of the three leading cases upon the subject in point of time, it is the most recent in point of time, but it is not the highest court in the state which has passed upon the problem. [28]

The Referee: Except, I think, the District Court of Appeal which interpreted the prior decisions of the Supreme Court of the state probably does just as good a job of interpreting the Supreme Court as I can, and that is the reason I gave Parkinson vs. Caldwell considerable weight. I don't know that I would have reached the conclusion I did, had not the District Court of Appeal interpreted some of the prior decisions in the manner in which it did.

Mr. Triester: I think this Court is bound to determine what the California law is, and in so doing you must be guided by the applicable decisions, to the extent that cases, if you should find are inconsistent with each other, the State of California Supreme Court decision would govern.

The remarkable thing is in Parkinson vs. Caldwell, Mr. Hemmerling mentions in his brief, that these three cases were never relied on and were never even cited to the District Court of Appeal.

I don't see how they could have been in ignorance of them.

The Referee: That sometimes happens.

Mr. Triester: In any event, my analysis of the Parkinson case makes it consistent with the other three, but because it is a suit between obligor and assignee, once viewed that way I have no quarrel with it at all.

I would like to say in closing one thing. I would like [29] to call to the Court's attention what I think is a rather important point, because it may well be, although I don't think so, it may be that the Court will come to the conclusion that this is really an open question in the State of California. If that is so, if the Court does come to that conclusion, then I think it would be incumbent upon the Court to fashion the most desirable rule in filling this gap, if there is a gap. I don't think there is a gap, I think the California cases speak on the subject.

The Court will recall in Parkinson against Caldwell they relied very heavily on the Allhusen case which is a New York case. It is a case that is not consistent with what I have been arguing. It is a case where the rights of the obligor vs. the assignee were involved, therefore it is really not in point with Parkinson. Parkinson takes some of the language of Allhusen and relies very heavily on it. Allhusen is a New York Court of Appeals case, and it has been tremendously criticized on policy grounds.

If this is an open question in the State of Cali-

fornia, I think a decision that the Court will have to determine is which policy to adopt; a decision which eliminates a very desirable financing device, such as a non-notification of accounts receivable and factoring would be an unwise decision. [30]

I would like to read to the Court briefly from a recent article on the subject by Professor Gilmore, who is a professor at Yale University and a very close colleague of Professor Moore, and very acquainted with bankruptcy problems and economics.

In an article which is cited by Mr. Hemmerling from the Yale Law Journal he says this on pages 19 and 20:

"It is of greater interest that the Court of Appeals, in repelling the suggestions, was unable to cite a single New York precedent which had held that a non-assignment clause was a defense to an action by an assignee. It was forced to fall back uncomfortably on the dicta in cases which had held the reverse, noting that none of the earlier cases had involved 'a contractual provision against assignments framed in the language of the clause now before us.'

"Furthermore, nothing in the Court's opinion betrays awareness that the conditions of accounts receivable financing had changed in any way since the late 19th or early 20th Century, when the cases principally relied on had been decided."

Here is Professor Gilmore's statement, which is in a way almost as strong as Professor McLaughlan's language.

"The case stands as a monument to the purest

[31] type of conceptualism, untainted by a breath of the work-a-day world."

I submit it is an open question in this state, and I think the Courts require——

The Referee: The question that bothered me was the question of unjust enrichment, and again I say I added this second paragraph, lest counsel think I overlooked that.

Then again I felt that a factor in this case and factors in all cases, talking of policy now, and answering the professor there, that the factors knew or certainly could have very easily known before taking an assignment and before disbursing the money, examine the purchase orders and see whether they were or were not assignable. If they were not assignable, they didn't have to buy the accounts receivable.

Of course, the assignor, that is the bankrupt also has a purchase order and it can be delivered to the assignee or the factor.

Mr. Triester: But assuming they can determine this, assuming there may be a problem, and assuming they can determine, they can't factor on a non-notification basis, they just can't lend on those accounts or buy those accounts without going to the obligor and notifying him about this, because they need his consent.

The Referee: They are not compelled to purchase those [32] accounts.

Mr. Triester: They may not have to, but wouldn't this be an unfortunate set of circumstances if all of the people in the area doing defense

work on subcontracts can no longer borrow on a non-notification basis? It would be a real blow to a very desirable type of financing.

The Referee: Perhaps. I don't know. Perhaps it will weed out the men from the boys and perhaps the reverse of your argument is equally true. It may eliminate hundreds of thousands of dollars of obligations which these undercapitalized companies incur and which result in non-payment and bankruptcy. You can argue it either way; I don't know.

Mr. Triester: I can make no independent economic judgment as to whether you should have large numbers of small firms or big giants, but I would say in my policy judgment only, as far as these businessmen are concerned, they want this type of financing device, so why shouldn't the law be their servant rather than their master in this type of situation?

The Referee: Except those remedial statutes which you advocate should be enacted by the Legislature. This legislation should not come in the form of a judicial interpretation or decision.

We have a similar situation under the Internal Revenue law, they do not recognize mechanic's liens, and [33] it is a very harsh law and has resulted in a great deal of hardship, and so on. It has been my comment in those cases that Congress enact remedial legislation because the statute is clearly to the contrary.

Mr. Triester: The holding now proposed is if we are making transactions good as between assignor and assignee, voidable or attackable by the creditors

of the assignor, even though there is no such special statute——

The Referee: I notice that it is now 12:20, and I think this matter should be continued until 2:00 o'clock this afternoon. [34]

[Endorsed]: Filed January 24, 1958.

[Endorsed]: No. 16042. United States Court of Appeals for the Ninth Circuit. Irving I. Bass, Trustee in Bankruptcy of the Estate of Zipco, Inc., a corporation, bankrupt, Appellant, vs. Aetna Factors Co., Fruehauf Trailer Co., and Com-Air Products, Inc., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: June 3, 1958.

Docketed: June 12, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16042

IRVING I. BASS, Trustee in Bankruptcy of Zipco, Inc., a corporation, Bankrupt,
Appellant,

vs.

AETNA FACTORS COMPANY, Appellee.

ADOPTION OF STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD ON APPEAL

To the United States Court of Appeals:

Comes now Irving I. Bass, Trustee in Bankruptcy in the matter of Zipco, Inc., a California corporation, the appellant herein, by and through his counsel, Craig, Weller & Laugharn, William E. Bartley of counsel, and hereby adopts the Appellant's Statement of Points on Appeal dated April 30, 1958 and the Designation of Contents of Record on Appeal dated April 30, 1958, save and except Item No. 9 of the said Designation of Contents of Record on Appeal, which is deleted; Item No. 13 which is deleted; Item No. 21 which is deleted, and Item No. 22 which is deleted. The adopted Designation of Contents of Record on Appeal should specifically contain any and all exhibits attached to the original Petition for Arrangement under Chapter

XI of the Bankruptcy Act or attached to any of the other documents designated.

The above adopted Statement of Points on Appeal and Designation of Contents of Record on Appeal are hereby incorporated herein by reference as fully as if set forth in detail herein.

Dated: June 26th, 1958.

CRAIG, WELLER &
LAUGHARN,
/s/ By WILLIAM E. BARTLEY,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 27, 1958. Paul P. O'Brien, Clerk.